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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CEMEX, S.A.,
Petitioner,
v.

UNITED STATES OF AMERICA,
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
and APASCO, S.A. de C.V.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Secretary of Commerce precluded from interpreting 19 U.S.C. § 1677b, a provision of the U.S. antidumping law, in a manner consistent with the language and fundamental purpose of the antidumping statute (19 U.S.C. § 1673 *et seq.*), and with the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT), to ensure that antidumping duties are imposed only in amounts necessary to offset unfair pricing?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner CEMEX, S.A., states that it has no parent corporation. CEMEX does, however, have a number of subsidiaries worldwide. These subsidiaries (except wholly-owned subsidiaries) are set out at Appendix 87a.

The respondents in this case are the United States Department of Commerce, International Trade Administration (hereinafter "Commerce Department"), which was one of the Defendant-Appellees in the Court of Appeals, Apasco, S.A. de C.V. (wholly owned by "Holderbank" Financiere Glaris Ltd., a publicly-owned Swiss corporation), which also appeared as a Defendant-Appellee below, and The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement, consisting of BoxCrow Cement; Florida Crushed Stone Co., Riverside Cement Co., North Texas Cement Co., Holnam, Inc., Phoenix Cement Co., Southdown, Inc. and Texas Industries, Inc., which appeared as Plaintiff-Appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CEMEX, S.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case.

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Federal Circuit in *Ad Hoc Committee v. United States* is reported at 13 F.3d 398 (1994), and is reprinted in the Appendix at 1a. The decision below of the U.S. Court of International Trade is reported at 787 F. Supp. 208 (1992), and is reprinted in the Appendix at 13a.

The Commerce Department determination which is the subject of this litigation was published in the *Federal Register* at 55 Fed. Reg. 29,244 (July 18, 1990), and is reprinted in the Appendix at 26a. The order of the Court of Appeals denying Petitioner's petition for rehearing is unreported and is reprinted at Appendix 64a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1994. The Court of Appeals denied Petitioner's petition for rehearing on March 1, 1994. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The following statutory provisions are relevant to this case and are set out in the Appendix at 66a-71a: 19 U.S.C. § 1677a (1988) (calculation of U.S. price) and 19 U.S.C. § 1677b (1988) (calculation of foreign market value).

STATEMENT OF THE CASE

This petition seeks review of a decision of the U.S. Court of Appeals for the Federal Circuit which, if allowed to stand, will preclude the Commerce Department from interpreting the antidumping statute in a manner consistent with its fundamental purpose and will result in determinations that do violence not only to that purpose, but also to the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT).

A. The U.S. Antidumping Statute

The U.S. antidumping statute, originally enacted in the Antidumping Act of 1921,[1] and now set out at 19 U.S.C.

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[1] Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921) (App. 75a).

§ 1673 *et seq.*[2], provides for the imposition of antidumping duties on imported merchandise which is sold in the United States at less than fair value.[3] The purpose of the additional duty is to offset the "margin of dumping" so as to equalize the prices of the merchandise in the U.S. and foreign markets,[4] thus depriving the foreign producer of any advantage it may have gained by dumping.

Pursuant to 19 U.S.C. § 1673 *et seq.*, the United States may impose antidumping duties on imported merchandise if two conditions are met: first, the administering authority[5] must determine that the imported merchandise is being, or is likely to be sold in the United States at

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[2] Trade Agreements Act of 1979, Pub. Law 96-39, 93 Stat. 162 *et seq.* (1979), as amended. The Trade Agreements Act technically repealed the Antidumping Act of 1921, but while making fairly substantial structural and procedural changes to the earlier law, "relatively little change [was] made in the substantive provisions of the law." H.R. Rep. No. 317, 96th Cong., 1st Sess. 59 (1979). *See also Matsushita Electric Industrial Co. Ltd. v. United States*, 529 F. Supp. 670, 674 (CIT 1981) ("Congress evinced a general intention to carry forward the antidumping law and its judicial and administrative precedents without substantive changes except as specifically noted.")

[3] The term "fair value" has not been defined by statute, but by regulation. The Treasury Department, which was the original administrator of the antidumping law, defined fair value at section 14.7 of its regulations. 19 C.F.R. § 14.7 (1956). The Department of Commerce definition is currently at 19 C.F.R. § 353.42 ("Fair value, used during the investigation, is an estimate of foreign market value.").

[4] The antidumping duty imposed is equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise. 19 U.S.C. § 1673.

[5] The antidumping statute was administered by the Treasury Department until 1980. On January 2, 1980, administration of the antidumping law was transferred from the Secretary of the Treasury to the Secretary of Commerce. Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,275, *reprinted in* 19 U.S.C. § 2171 (1988).

less than fair value; and second, the U.S. International Trade Commission must determine that an industry in the United States is suffering from or is threatened by material injury as a result of imports of that merchandise.[6] If both agencies make affirmative determinations with respect to these issues, the Commerce Department publishes an antidumping order in the *Federal Register.*

The calculation of the *amount* of the antidumping duty to be imposed on imported merchandise requires the Commerce Department to determine the price of the subject merchandise in the foreign market and the price in the U.S. market. Since prices in these markets may be different for many reasons other than dumping, the statute provides for certain adjustments to the prices in each market in order to allow a fair comparison of the two. The methodology for calculating the price of the merchandise in the United States ("U.S. price") is set forth in 19 U.S.C. § 1677a (App. 66a),[7] while the methodology for calculating the price of the merchandise in the foreign market is set out in 19 U.S.C. § 1677b ("foreign market value", or "FMV") (App. 68a). In each antidumping investigation, the Commerce Department collects information from the foreign producers of the subject merchandise regarding its prices in both markets, and makes adjustments to the reported prices in accordance with the U.S. price and foreign market value provisions of the statute in order to achieve a fair comparison and an ac-

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[6] For a more extensive discussion of the administration of the antidumping law, see Stephen J. Powell, Craig R. Giesse & Craig L. Jackson, *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks,* 11 Nw. J. Int'l L. & Bus. 177 (1990).

[7] U.S. price is either "purchase price," for sales made to unrelated customers for export to the United States, or "exporter's sales price," for sales made to related importers for resale in the United States.

curate calculation of the amount of duty necessary to offset the margin of dumping.[8]

B. The Mexican Cement Determination

On October 23, 1989, the Commerce Department initiated an antidumping investigation with respect to imports of gray portland cement and clinker (hereinafter "cement") from Mexico. 54 Fed. Reg. 40,531 (1989). In its final determination of sales at less than fair value, the Commerce Department calculated U.S. price and foreign market value after taking into account various adjustments to the sales price in each market. 55 Fed. Reg. at 29,245-246, App. 30a-33a. The sole issue involved in this petition is the Court of Appeals decision that the Commerce Department's deduction of presale transportation costs from foreign market value was contrary to the statute.

The statute neither prohibits this adjustment to foreign market value, nor expressly provides for it. A similar deduction is, however, expressly required in the calculation of U.S. price. In its determination, the Commerce Department explained that given the adjustment required in the U.S. price provision, it was deducting pre-sale transportation expenses in the foreign market from foreign market value in order "to ensure an 'apples-to-apples' comparison [of prices]." 55 Fed. Reg. at 29,251, App. 55a.

The U.S. producers of cement challenged this determination before the U.S. Court of International Trade,[9] arguing that the language of the antidumping statute pre-

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[8] *See also, generally,* 19 C.F.R. Part 353 (Department of Commerce, International Trade Administration antidumping regulations).

[9] Pursuant to 28 U.S.C. § 1581(c), the U.S. Court of International Trade has exclusive jurisdiction over actions commenced to challenge final determinations in antidumping cases under 19 U.S.C. § 1516a.

cludes the deduction of pre-sale transportation costs from foreign market value, and disputing the authority of the Commerce Department to make adjustments not specifically set out in the statute in order to ensure fair, apples-to-apples price comparisons. The court rejected the arguments raised by the plaintiff, and affirmed the determination made by the Commerce Department. The court held that "the deduction of pre-sale inland freight expenses on the home market side engenders a more accurate and meaningful comparison than does plaintiff's approach. . . ." *Ad Hoc Committee v. United States*, 787 F. Supp. 208, 213 (CIT 1992), App. 21a.

On appeal, the Court of Appeals for the Federal Circuit reversed the Court of International Trade's decision and held that the Commerce Department had no authority to deduct pre-sale transportation costs from foreign market value, even if the agency's intent was to ensure fair, apples-to-apples price comparisons. The court reasoned that the existence of an express provision for a deduction from sales price in one part of the statute *necessarily* means that the omission of a similar deduction in another provision of the same statute was intentional. Accordingly, the court held that the Commerce Department had no authority to deduct pre-sale transportation costs from foreign market value in order to effect a more accurate and fair comparison of prices.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case undermines the essential purpose of the antidumping statute, which is to offset as precisely as possible the amount by which the price of merchandise sold in the foreign market exceeds the price for the same merchandise when sold in the United States. The court's improper application of principles of statutory construction, and failure to consider the purpose of the statute, will result in the imposition of excessive antidumping duties in this case, and in many other antidumping proceedings. The decision of

the court below failed to give proper deference to the agency's interpretation of the antidumping law as permitting adjustments to foreign market value which do not contravene the express language of the statute in order to ensure fair price comparisons. The decision also overturned three decades of administrative practice; will restrict the agency's ability to administer the statute according to Congressional intent; and will result in calculations that exaggerate dumping margins in a manner that violates the obligations of the United States under the GATT.

This Court should thus resolve the important, and recurring, question as to whether the Commerce Department has the authority to administer the law in a way that ensures fair and accurate dumping margins in keeping with the fundamental purpose of the statute and U.S. international obligations.

I. THE FACT THAT AN ADJUSTMENT TO PRICE WAS INCLUDED IN ONE SECTION OF THE ANTIDUMPING STATUTE BUT NOT IN ANOTHER DOES NOT COMPEL THE CONCLUSION THAT CONGRESS INTENDED TO PRECLUDE A SIMILAR ADJUSTMENT IN THE LATTER SECTION

For both U.S. price and foreign market value, the U.S. antidumping statute sets out certain adjustments that must be made to the actual sales prices in both markets. On the U.S. price side, the statute specifically calls for, *inter alia*, the deduction of:

> [t]he amount . . . attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States. . . .

19 U.S.C. § 1677a, App. 67a. The foreign market value provision in the statute (App. 68a), on the other hand, does not call for any specific deductions from the price,

but does expressly authorize the Commerce Department to "make allowance" for differences between U.S. price and foreign market value due in whole or in part to (1) differences in commercial quantities sold in the two markets; [10] (2) other differences in circumstances of sale; [11] and (3) physical differences in the merchandise compared.[12]

A. The Court of Appeals Improperly Applied the Principle of *Inclusio Unius Est Exclusio Alterius* In Denying the Commerce Department the Authority To Interpret the Antidumping Statute In Accordance With Its Fundamental Purpose

In its decision below reversing the Court of International Trade and the Commerce Department, the Court of Appeals for the Federal Circuit held that since Congress had specifically provided for the deduction of transportation costs from U.S. price, but had failed to expressly provide for such a deduction from foreign market value, the Commerce Department did not have the

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[10] 19 U.S.C. § 1677b(a)(4)(A).

[11] 19 U.S.C. § 1677b(a)(4)(B). Between 1980 and 1987, the Commerce Department apparently deducted transportation costs from foreign market value under this circumstance of sale provision. As discussed in greater detail below, this practice diverged from several decades of Treasury Department practice, which had been to make this deduction apart from the circumstance of sale provision. Pursuant to its regulations, however, in "purchase price" comparisons the Commerce Department could only deduct *direct* expenses under the circumstance of sale provision (19 C.F.R. § 353.56(a)) and, as it had generally found pre-sale transportation expenses to be indirect, the Commerce Department generally did not deduct these expenses from foreign market value if the U.S. price was purchase price. In 1987 the Commerce Department recognized that making adjustments for transportation expenses under the circumstance of sale provision resulted in unfair comparisons, and returned to the longstanding Treasury practice of deducting these expenses prior to making the circumstance of sale calculation, in order to ensure a truly fair price comparison.

[12] 19 U.S.C. § 1677b(a)(4)(C).

authority to interpret the statute as permitting such a deduction from foreign market value. The Federal Circuit rejected the argument that the absence of language describing a deduction of transportation costs from foreign market value reflected a gap in the legislation for the agency to fill, and instead held that the silence of the foreign market value provision on this point was itself a statement of Congressional intent.

The Federal Circuit panel's holding represents a reflexive application of a principle of statutory interpretation that is not meant to be applied by rote. Principles of statutory construction are only aids to interpretation, not rules to be applied blindly in all circumstances. *United States v. Castro*, 837 F.2d 441, 443 n.2 (11th Cir. 1988). The principle of construction applied in this instance (frequently referred to by the Latin phrase *inclusio unius est exclusio alterius*), like other principles of statutory construction "has its limits and exceptions and *cannot apply when the legislative history and context are contrary* to [the proposed] reading of the statute." *Id.* at 443-43 (emphasis added), *citing Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23, 103 S.Ct. 683, 690 n.23 (1983). This Court has held that principles of statutory construction "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123 (1943). *See also Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307 (9th Cir. 1992) (*Inclusio unius est exclusio alterius* principle applies only when it makes sense as a matter of legislative purpose).

In this case, the Court of Appeals interpreted the absence of parity in the two sections of the antidumping statute as a clear expression of Congressional intent. App. 8a. Consequently, the court held that it was unnecessary to look beyond the plain words of the statute to examine legislative intent, "[*e*]*ven if the statute's 'primary goal' may seem to be ill-served by not allowing the deduc-*

tion from FMV." App. 10a. What the court described as the statute's "plain language," however, is actually the complete absence of language, and the meaning of this silence in the statute is far from clear. As this Court has held, "[n]ot every silence is pregnant," *Burns v. United States*, —— U.S. ——, 111 S.Ct. 2182, 2186 (1991), *quoting State of Illinois, Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983), and while the language of the statute is certainly the starting point for interpretation, it is *not* the end of the inquiry. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980). In determining the meaning of a statute, courts must look not only to the language of the statute, but also to the design of the legislation as a whole and to its object and policy. *Crandon v. United States*, 494 U.S. 152, 110 S.Ct. 997 (1990).

Even a brief review of the statute reveals that the overall structure of the two provisions is not parallel: each takes an entirely different approach to the calculation of the respective value, with the goal being to derive a value that can fairly be compared with the other. Given the overall lack of consistency between the two provisions, the absence of language from only one cannot be given the significance attached by the court below.

The argument that little can be made of the absence of a specific provision for a deduction for transportation costs from foreign market value is particularly compelling in light of the substantial evidence showing that the decision of the Court of Appeals directly contravenes the fundamental purpose of the antidumping statute, and will compel the Commerce Department to violate the international obligations of the United States under the GATT.

1. *Congress Clearly Intended That U.S. Price and Foreign Market Value Be Calculated At the Same Level Of Trade In Order To Ensure That Antidumping Duties Offset Only the Actual Margin Of Dumping*

The purpose of the U.S. antidumping statute is to "*equalize* sales at less than the foreign home market value . . ., thereby making it unprofitable to dump goods on the markets of the United States at lower prices." H.R. Rep. No. 1, 67th Cong., 1st Sess. 23 (1921) (emphasis added).[13] *See also* S. Rep. No. 1298, 93rd Cong., 2d Sess. 123, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7267 ("no compensation or retaliation is in order" under the antidumping statute); *Chaparral Steel Co. v. United States*, 901 F.2d 1097 (Fed. Cir. 1990) (antidumping duties are intended to be solely remedial); *National Knitwear & Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1372 (CIT 1991) ("dumping duties are remedial, not penal, in nature" and are designed "to equalize competitive conditions between the exporter and American industries affected"); *C.J. Tower & Sons v. United States*, 71 F.2d 438, 443 (CCPA 1934). Since the statute is not penal in nature, but is intended only to impose a duty that offsets the margin of dumping, there is no intention that the duty collected *exceed* the amount necessary to offset the price differential in the two markets.[14]

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[13] Neither the Senate report nor the Conference report for the Antidumping Act of 1921 describes the purpose of the statute in specific language. The Conference report does state, however, that "[t]he Senate bill adopts the basis of the House bill in determining the dumping duty. . . ." Conf. Rep. No. 79, 67th Cong., 1st Sess. 21 (1921). Since the Conference report in turn adopted the Senate version of the bill (which made only one change to the House bill), the Conference report expressly accepts the underlying premise of the Antidumping Act as expressed in the House report.

[14] In its opinion, the Court of Appeals speculated that "Congress may have wanted the differential [in the two provisions of the statute] for any number of reasons, the most evident of which being

In order to ensure that the amount of the antidumping duty does not exceed the actual margin of dumping, it is critical that the prices in the U.S. and foreign markets be compared at the same point. The legislative history of the antidumping statute makes clear that Congress intended that prices be fairly compared at the same level of trade, and that this comparison generally be made at the ex-factory level—which requires the deduction of all inland freight expenses on both sides of the equation.

In 1979, Congress passed the Trade Agreements Act, which was intended to bring the U.S. antidumping law into conformity with the new GATT Antidumping Code. *See* Pub. L. 96-39, 93 Stat. 162 *et seq.* The Statement of Administrative Action for the 1979 Act, which was issued in conjunction with the actual legislation, notes specifically that "the provisions of the Trade Agreements Act and the provisions of this statement regarding the administration of U.S. law have been developed to be fully consistent with the trade agreements negotiated in the MTN [GATT Tokyo Round], and when the Act becomes effective, will permit the United States to *carry out fully its obligations under the agreements.*" Trade Agreements Act of 1979, Statements of Administrative Action, H.R. Doc. No. 96-153, 96th Cong., 1st Sess. (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 665, 667 (emphasis added).[15]

The clearly expressed understanding of Congress that the passage of the Trade Agreements Act made the U.S.

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to increase the likelihood and size of dumping margins found by Commerce." App. 11a. The foregoing discussion demonstrates that this was clearly *not* the purpose of the statute. Moreover, such a goal would violate the GATT, a result not in keeping with the stated purpose of the 1979 Trade Agreements Act, as is discussed in greater detail below.

[15] The statements of administrative action were expressly approved by Congress in Section 2 of the Trade Agreements Act itself. Pub. L. 96-39, 93 Stat. 147 (1979).

antidumping law fully consistent with the GATT is relevant here because the GATT Antidumping Code specifically requires that price comparisons be made at the same level of trade, and that the comparison generally be made at the ex-factory level. Article 2 of the Code expressly states that:

> In order to effect a fair comparison between the export price and the domestic price in the exporting country (or country of origin) . . . , the two prices shall be compared at the same level of trade, *normally at the ex-factory level*, and in respect of sales made at as nearly as possible the same time.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 2, ¶ 6, 26th Supp. BISD 171 (1980) (emphasis added).[16] Since it is the clearly expressed intent of Congress that the U.S. antidumping law be consistent with the GATT Antidumping Code, and since that Code generally requires comparisons at the ex-factory level, Congress must also have intended that the Commerce Department make price comparisons at the ex-factory level. *See also Washington Red Raspberry Comm'n v. United States*, 859 F.2d 898, 901 (Fed. Cir. 1988) (both foreign market value and U.S. price "are subject to cost adjustments in an attempt to derive values at a common point in the chain of commerce, so that the values reasonably can be compared on an equivalent basis.").

The comparisons required by the GATT and by Congress cannot be made without deducting pre-sale transportation costs from foreign market value, since failure

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[16] This language has also been carried over to the new GATT agreement signed this past April. *See Final Act Embodying the Results Of the Uruguay Round Of Multilateral Trade Negotiations*, Agreement On Implementation Of Article VI Of GATT 1994, Part I, Article 2, ¶ 2.4 (15 December 1993) ("A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level. . . .").

to make the deduction from one side of the equation would result in a distorted ex-factory to ex-warehouse price comparison. The Commerce Department's deduction of pre-sale transportation costs from foreign market value was therefore fully consistent with the goals of the antidumping statute as expressed by Congress, as well as with the international obligations of the United States under the GATT.

2. *The Fact That Congress Was Repeatedly Made Aware That the Administering Authority Was Deducting Transportation Costs From Foreign Market Value In Order To Make Fair Comparisons, and Yet Failed To Amend the Statute, Is Evidence Of Its Approval Of That Practice*

Recognizing that, in order to make the fair comparisons required by the antidumping statute, it was necessary to deduct transportation costs from *both* U.S. price *and* foreign market value, the Commerce Department, and the Treasury Department before it, routinely made an appropriate adjustment to foreign market value in order to derive ex-factory prices.[17] This practice by the ad-

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[17] For evidence of the long-standing practice at Treasury Department, see the 1957, 1961 and 1979 studies of agency practice discussed in this section. For just a few examples of the Treasury's practice of deducting transportation costs for both U.S. price and foreign market value, *see, e.g., Saccharin From the Republic of Korea*, 42 Fed. Reg. 46,091 (1977); *Saccharin From Japan*, 42 Fed. Reg. 46,091 (1977); *Monosodium Glutamate From the Republic of Korea*, 42 Fed. Reg. 10,084 (1977). For practice at the Commerce Department, *see, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof ("AFBs") From France, et al.*, 57 Fed. Reg. 28,360, 28,397 (1992); *Stainless Steel Hollow Products From Sweden*, 57 Fed. Reg. 21,389, 21,391 (1992); *Certain Small Business Telephone Systems and Subassemblies Thereof From Korea*, 57 Fed. Reg. 8,298, 8,299 (1992); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*, 57 Fed. Reg. 4,960, 4,967 (1992); *Tapered Roller Bearings, Four Inches Or Less In Outside Diameter, and Certain Components Thereof, From Japan*, 56 Fed. Reg. 65,228, 65,233 (1991); *Certain*

ministering authorities, which dates back over 30 years, highlights perhaps the most significant point about the absence of a specific deduction in the foreign market value provision of the statute: Congress was explicitly told numerous times—at least as early as 1957—that agency practice was to deduct transportation cost from foreign market value in order to make apples-to-apples comparisons at the ex-factory level. Notably, Congress *never amended the law to prohibit this practice,* in spite of having had ample opportunity to do so.

In 1957, the Treasury Department submitted a memorandum to Congress with respect to proposed legislation to amend the antidumping law. In its memorandum, Treasury outlined, *inter alia,* the methodology used to calculate U.S. price and "fair value" (now foreign market value). The Treasury Department explicitly told Congress that "prices must be adjusted so that they are properly comparable—which typically means a comparison f.o.b. factory." *Bills To Amend Certain Provisions of the Antidumpting Act of 1921: Hearings Before the Committee On Ways and Means, U.S. House of Representatives, On H.R. 6006, 6007 and 5120,* 85th Cong., 1st Sess. 17 (1957) ("Report Of the Secretary Of the Treasury To the Congress On the Operation and Effectiveness of Antidumping Act and On Amendments To

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Welded Carbon Steel Standard Pipes and Tubes From India, 56 Fed. Reg. 64,753, 76,760 (1991); *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan,* 56 Fed. Reg. 41,508, 41,512 (1991); *AFBs From the Federal Republic of Germany,* 56 Fed. Reg. 31,692, 31,715 (1991); *Tapered Roller Bearings, Four Inches Or Less In Outside Diameter, and Certain Components Thereof, From Japan,* 56 Fed. Reg. 26,054, 26,056 (1991); *Gray Portland Cement and Clinker From Japan,* 56 Fed. Reg. 12,156, 12,161 (1991); *Red Raspberries From Canada,* 56 Fed. Reg. 677 (1991); *Television Receivers, Monochrome and Color, From Japan* 55 Fed. Reg. 35,916, 35,920 (1990); *Industrial Nitrocellulose From the Federal Republic of Germany,* 55 Fed. Reg. 21,058, 21,060 (1990); *Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,440, 25,441-42 (1987).

the Act Considered Desirable Or Necessary"). Such an adjustment obviously requires the deduction of any cost incurred in transporting the subject merchandise from the factory to the customer and, in fact, Treasury's example of a typical calculation of fair value demonstrated quite clearly to Congress that Treasury deducted transportation expenses from *both* U.S. price *and* fair value (foreign market value) in order to arrive at a fair, ex-factory comparison. *Id.* at 12-13.[18] The failure of Congress specifically to preclude such deductions after being told by Treasury that they were being made provides strong evidence that Congress had no intention of altering that practice.[19]

In 1961, the Treasury Department prepared yet another study of its practices under the antidumping act. Here again, as in the 1957 memorandum to Congress, Treasury provided a sample calculation of U.S. price and foreign market value that leaves no question that the Department routinely deducted the transportation cost on *both* sides of the equation in order to allow an ex-factory price comparison, and did so apart from the circumstance of sale provision.[20] Treasury Dept. Memorandum

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[18] The example set out in the Treasury Department report is included in the Appendix at 81a.

[19] In its 1957 memorandum, the Treasury Department did suggest that Congress amend the antidumping law to authorize adjustments to foreign market value for "circumstances of sale," which Treasury believed could not be made under the law as written. Congress adopted the recommendations offered by the Treasury Department and amended the law to allow such adjustments. Pub. L. No. 85-630, 72 Stat. 583 (1958). This suggestion, and the subsequent amendment, were entirely unrelated to the deductions that the Treasury Department was already making for foreign market transportation costs.

[20] Considering that circumstances of sale adjustments are discussed in an entirely separate part of its 1957 memorandum, the Treasury Department evidently was not making its transportation cost adjustments as a circumstance of sale, even after this provision

Relating To Antidumping Act, 1921 (August 1961), *reprinted in* I.S.D. Metzger, *Law of International Trade: Documents and Readings* (1966) at 745, 746-47. Following this sample calculation, the Treasury Department explained that:

> The price comparison to be made under the Antidumping Act, therefore, is not between the $1.00 paid by the French home consumption purchaser and the $1.00 paid by the United States purchaser. It is, instead, a comparison between the $.95 f.o.b. factory price paid by the home consumption purchaser and the $.70 f.o.b. factory price paid by the United States purchaser.

Id. at 747.

In 1979, Congress requested that the General Accounting Office conduct a study of antidumping methodology. In that report, the GAO explained the Treasury Department methodology in great detail. Again, sample calculations provided to Congress in that study demonstrate that the Department was *still* deducting transportation costs from both U.S. price and foreign market value to achieve an ex-factory price on each side, and was continuing to make this adjustment apart from the circumstance of sale provision. General Accounting Office, Report to Congress, *U.S. Administration of the Antidumping Act of 1921* (March 15, 1979) at 24-27 (included herewith at App. 82a).

In the face of these clear explanations of administrative practice Congress never expressed disapproval of the agency practice, or the need to amend the language of the statute to preclude—or authorize—the deduction of transportation costs from the home market price. Where an agency interpretation of a statute has been brought to the

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was included in the 1958 amendments to the antidumping statute. The Treasury Department therefore continued its practice of making the adjustments for transportation costs apart from that provision in order to achieve fair, ex-factory to ex-factory comparisons.

attention of Congress, the failure of Congress to change the interpretation is presumptive evidence of its correctness. *See* Norman L. Singer, *Sutherland Statutes and Statutory Construction 2a*, § 49.10 (5th ed. 1992). *See also CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367, 383-85, 101 S.Ct. 2813, 2823-24 (1981). Similarly, pursuant to the "legislative reenactment doctrine," Congress is presumptively aware of agency practice and statutory interpretation when it amends or reenacts a statute without change to the relevant provision. *See Lorillard v. Pons*, 434 U.S. 575, 580-82, 98 S. Ct. 866, 870-71 (1978) (Congress was presumed to be aware of agency interpretation of the statute, and adopted that interpretation when it selectively modified certain of those practices); *United States v. Correll*, 389 U.S. 299, 305-06, 88 S.Ct. 445, 448-49 (1967); *Ward v. C.I.R.*, 784 F.2d 1424, 1430 (9th Cir. 1986).

Both the 1957 and the 1979 studies were submitted to Congress while it was considering significant amendments to the Antidumping Act, yet Congress took no action whatsoever to change Treasury's practice, or to change the law to conform it to Treasury's practice.[21] In

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[21] In its decision below, the Court of Appeals states that in a 1985 study, the Commerce Department told Congress that it "believed it lacked statutory authorization to deduct home market transportation costs from FMV," and interpreted Congress's failure subsequently to include such authority as a rejection of the deduction. App. 9a. This statement and interpretation seriously mischaracterize the 1985 study. As the foregoing discussion demonstrates, deductions from foreign market value for transportation costs were routinely made for at least two decades prior to the cited study, and the 1985 study actually states that "we conclude that the current statutory provisions governing adjustments are adequate and provide the Department with the authority to take into account all relevant factors to ensure that antidumping calculations are made in a fair and accurate manner." "Study of Antidumping Adjustments Methodology and Recommendations For Statutory Change" (November 1985) at 62. The Department went on to note that "[u]nder current practice, the Department deducts

light of the evidence before Congress during revisions of the Act, the failure to amend the statute to expressly provide for the deduction of transportation costs from foreign market value cannot be read as a prohibition of such deductions. It must, on the contrary, be read as an approval of the established practice of the Treasury Department. In view of Congress's awareness of the Treasury Department's practice, the most reasonable explanation for the absence of an express deduction is that Congress simply saw no need for it, since the Treasury Department was already making the adjustment under the law as written.

The foregoing discussion demonstrates that the Federal Circuit improperly failed to take into consideration the substantial evidence that Congress did not, in fact, intend that the omission of a specific deduction for transportation costs from foreign market value be interpreted to prohibit the Commerce Department from making appropriate deductions to achieve a fair calculation of antidumping duties.

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foreign market delivery costs and foreign market packing costs pursuant to the implicit authority granted under [the circumstance of sale provision]." *Id.* at 63. While the Department's practice of making the deduction under the circumstance of sale provision reflects a departure from the consistent Treasury practice of making the deduction separately, two years later Commerce returned to the practice of deducting transportation costs from foreign market value apart from the circumstance of sale provision, recognizing the need to make fair comparisons. *See Industrial Phosphoric Acid From Israel*, 52 Fed. Reg. 25,440, 25,441-42 (1987), and other cases listed *supra* in note 17. In any case, the report makes very clear that the Department did not believe it "lacked authority" to make such deductions. Consequently, Congress's failure to change the foreign market value calculation in the statute cannot possibly be read as rejecting the deduction; rather, given that Commerce had *again* told Congress that it was making this deduction, the failure to amend the provision must be seen as further evidence that Congress approved of the deduction.

B. The Court of Appeals Opinion Runs Counter To an Earlier Decision Of the Same Court, Which Provided Substantive Support For the Commerce Department's Determination

It is also important to note that the Federal Circuit has previously approved the very approach taken by the Commerce Department in this case. In *Smith Corona Group, Consumer Products Division, SCM Corporation v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1274 (1984), the Federal Circuit upheld a Commerce Department regulation permitting a deduction from foreign market value for certain indirect selling expenses under the circumstance of sale adjustment to match deductions for such expenses specifically required on the U.S. price side, *even though the allowed deduction was not specifically provided in the statute for foreign market value calculations.* Generally, indirect expenses cannot be deducted from either U.S. price or foreign market value. When U.S. price is calculated on the basis of exporter's sales price, however, the statute requires the deduction of certain indirect expenses. 19 U.S.C. § 1677a(e), App. 67a-68a. A similar exception for indirect expenses in exporter's sales price comparisons is not included on the foreign market value side. In order to ensure fair comparisons, the Commerce Department promulgated a regulation providing for the deduction of indirect expenses from foreign market value in exporter's sales price comparisons, up to the amount deducted from the U.S. price—the so-called ESP offset. 19 C.F.R. § 353.15(c) (1980).

In upholding the ESP offset, the Federal Circuit acknowledged that the express language of the antidumping statute did not call for the deduction of indirect expenses from foreign market value. *See* 713 F.2d at 1578. The court did not stop there, however. It noted that the statute "*does not expressly foreclose*" the deduction, and then went on to consider the overall structure and basic purpose of the statute. The court concluded that:

> One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples. The offset appears to generate two fair value comparisons, apples with apples (purchase price) and oranges with oranges (exporter's sales price). The differences between United States price generated from purchase price and from exporter's sales price was created by the statute. Were it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin. We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison. The offset is an attempt to achieve such a comparison.

Id. (emphasis added). The court therefore upheld the ESP offset as a "proper and reasonable exercise of the Secretary's authority to administer the statute fairly." *Id.* at 1579.[22]

Pursuant to the legislative history of the antidumping statute, and the holding in *Smith Corona*, the Court of Appeals should have acknowledged the authority of the Commerce Department to make an adjustment to foreign market value which, while not expressly provided for in the statute, did not contravene the express language of the statute and instead furthered the fundamental purpose of the statute. The decision of the Court of Appeals should therefore be reversed.

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[22] The Court of Appeals below did briefly discuss *Smith-Corona* in its opinion, but dismissed it as inapplicable since it does "not apply where the Act itself clearly expresses the intent of Congress." The language of the statute at issue in *Smith-Corona* was no clearer on its face than is the language at issue here: in both cases a provision had been specifically included in the U.S. price provision, but not in the FMV provision. The Court of Appeals' offhand dismissal of *Smith-Corona* was therefore inappropriate.

II. THE COURT OF APPEALS FAILED TO GIVE PROPER DEFERENCE TO THE COMMERCE DEPARTMENT'S INTERPRETATION OF THE ANTI-DUMPING STATUTE

Absent a clear direction in the statute, substantial deference must be given to an interpretation of the statute by the agency charged with its administration. Courts have long recognized the deference due an executive agency's action. *Pauley v. Bethenergy Mines, Inc.*, —— U.S. ——, 111 S. Ct. 2524, 2534 (1991); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445 (1978). Where an agency is charged with administering a statute, part of its authority includes "the power to give reasonable content to the statute's textual ambiguities." *Dept. of Treasury, I.R.S. v. FLRA*, 494 U.S. 922, 110 S. Ct. 1623, 1629 (1990). Particularly where the agency requires expertise to administer a statute, deference is due its interpretation of the statute. *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389, 104 S. Ct. 2472, 2479-80 (1984). Where more than general knowledge is required to understand fully the statement's policy, the agency's rational view should be accepted unless it conflicts with the statute's plain language or its legislative history. *Chevron*, 467 U.S. at 844-45, 104 S. Ct. at 2783. *See also* L. Silberman, *Chevron—The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 822-24 (1990); J. Restani, *Judicial Review in International Trade*, 37 Am. U. L. Rev. 1075, 1084-85 (1988).

The Commerce Department is charged with the administration of a particularly complex statutory scheme, requiring significant expertise and specialized understanding. As noted by the Federal Circuit on another occasion:

> The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate

> framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has been entrusted with responsibility for implementing the antidumping law. The Secretary has broad discretion in executing the law.

Smith Corona Group, 713 F.2d at 1571 (footnotes omitted).

As explained above, the Commerce Department's determination in the investigation concerning cement from Mexico was consistent with agency practice dating back at least to 1957, and thus reflects a long-standing, well-established practice. The practice was very recently reiterated in the Commerce Department's current Antidumping Manual, where the Department stated that:

> Movement expenses, which are included in the foreign market value, are deducted from that price. . . . Movement expenses are those costs incurred by the seller in moving the merchandise under consideration from the factory to the point of delivery.

U.S. Dept. of Commerce, Import Administration, *Antidumping Manual* Chapter 8 at 13 (1993).

Since the Commerce Department's determination to deduct pre-sale transportation costs from foreign market value in the cement investigation was consistent with long-standing administrative practice and was consistent with legislative intent, the determination was entitled to tremendous deference from the courts. The Court of International Trade was therefore correct in upholding the Department's determination, and the Court of Appeals for the Federal Circuit erred in reversing that decision.

CONCLUSION

In order to settle an important issue with ramifications for the foreign policy and international economic relations of the United States, this petition for a writ of certiorari to the Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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May 27, 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1239

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee,

CEMEX, S.A.,
Defendant-Appellee,

and

APASCO, S.A. DE C.V.,
Defendant-Appellee.

DECIDED: January 5, 1994

Before MAYER and LOURIE, *Circuit Judges*, and LAY, *Senior Circuit Judge.**

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* Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

LAY, *Senior Circuit Judge.*

This is an appeal from a decision of the Court of International Trade brought by the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement.[1] The Ad Hoc Committee filed an antidumping petition that resulted in investigations of imports of cement and cement clinker from Mexico. The Committee alleged that imports of gray portland cement and cement clinker from Mexico were being, or were likely to be, sold in the United States at less than fair value within the meaning of 19 U.S.C. § 1673 (1988). The Committee alleged that as a result of the unfair price, an industry in the United States was materially injured or threatened with material injury by reason of these imports. The International Trade Administration of the United States Department of Commerce (Commerce) compared the United States and home-market sales of three Mexican producers of cement, including defendant-intervenors Cemex, S.A., and Apasco, S.A. de C.V., as well as Cementos Hidalgo, S.C.L., and reached a final determination that Mexican cement and clinker were being, or were likely to be, sold in the United States at less than fair value. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 29,244 (Dep't Comm. 1990). The Antidumping Act provides that a foreign producer engages in dumping to the extent that the United States price (USP),[2] as calculated pursuant to 19 U.S.C.

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[1] The Ad Hoc Committee is an association of United States producers of gray portland cement and clinker with production facilities in Arizona, New Mexico, Texas, and Florida.

[2] USP is initially measured as either the "purchase price" or "exporter's sales price" (ESP) of the merchandise, whichever is appropriate. 19 U.S.C. § 1677a(a) (1988). "Purchase price" is the price at which a buyer in the United States agrees to purchase the merchandise from a reseller or from the foreign manufacturer. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1577 (Fed. Cir. 1993); 19 U.S.C. § 1677a(b) (1988). This measure of USP is used where the U.S. importer is an unrelated, independent party. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). "Exporter's sales

§ 1677a, is less than the foreign market value (FMV)[3] of the same or similar merchandise, calculated pursuant to 19 U.S.C. § 1677b.[4] Following its determination that dumping had occurred, and a separate finding by the International Trade Commission that a United States industry was being materially injured by imports of gray

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price" is the price at which the foreign manufacturer or its agent sells or agrees to sell the merchandise in the United States. *Zenith*, 988 F.2d at 1577; 19 U.S.C. § 1677a(c) (1988). It is used where the importer is related to the foreign manufacturer, such that an arm's length transaction does not occur until the goods are resold to a retailer or to the public. *Smith-Corona*, 713 F.2d at 1572. In this case, Commerce used the purchase price approach. Once the initial USP figure is established, the statute then specifically requires Commerce to deduct, in the section relevant to this appeal, any amount "attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A) (1988).

[3] Commerce measures FMV as the foreign manufacturer's sales price in the "ordinary course of trade" in its own country, for goods identical or similar to the goods exported to the United States. 19 U.S.C. § 1677b(a)(1)(A) (1988). Where reliable information regarding a foreign manufacturer's home country sales is lacking, Commerce may base FMV on the price of merchandise offered for export sale to countries other than the United States, 19 U.S.C. § 1677b(a)(1)(B) (1988), or on a "constructed value," 19 U.S.C. § 1677b(a)(2) (1988); *Zenith*, 988 F.2d at 1577. In this case, Commerce based FMV on the foreign manufacturers' home-market sales. Like USP, FMV is to be adjusted to account for various factors. *See* 19 U.S.C. § 1677b(a)(1), (4) (1988). Unlike the USP provision, however, the FMV provision does not list shipping costs among the amounts to be deducted.

[4] 19 U.S.C. § 1673 (1988) requires Commerce to assess antidumping duties on imported merchandise "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." Thus, the higher the FMV and the lower the USP, the greater the margin of dumping and the greater the antidumping duty that will be imposed. *See Zenith*, 988 F.2d at 1576.

portland cement and cement clinker from Mexico,[5] Commerce published an antidumping duty order reflecting its calculations of the manufacturers' margins of dumping. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 35,443 (Dep't Comm. 1990).

The Ad Hoc Committee challenged Commerce's calculations of the dumping margins in the Court of International Trade. *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 787 F. Supp. 208 (Ct. Int'l Trade 1992). The court[6] upheld Commerce's deduction from foreign market value of the costs of transporting cement from the manufacturing plants to storage facilities in Mexico prior to its sale to home-market (Mexican) customers. *Id.* We reverse and remand.

II.

The sole issue on appeal is whether the foreign market value provision of the antidumping statute, 19 U.S.C. § 1677b, authorizes a deduction from foreign market value of pre-sale transportation costs within the exporting country for goods sold within that country. The parties agree that although the Act requires Commerce to deduct transportation costs from USP, there is no specific statutory authorization for Commerce to deduct home-market transportation expenses from its calculations of FMV. In the past, Commerce determined whether to deduct home-market transportation costs by looking to the "circumstances of sale" provision of 19 U.S.C. § 1677b(a)(4)

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[5] Gray Portland Cement and Cement Clinker from Mexico, USITC Pub. 2305, Inv. No. 731-TA-451 (Aug. 1990) (final determination), *aff'd sub nom. Cemex, S.A. v. United States*, 790 F.Supp. 290 Ct. Int'l Trade 1992), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993) (table).

[6] The Honorable Jane A. Restani, United States Court of International Trade.

(1988).[7] This provision and its accompanying regulations, *see* 19 C.F.R. § 353.56(a)(1) (1993), require a direct relationship between an expense and the sale at issue. Commerce's longstanding general practice, therefore, was to deduct from foreign market value only those transportation costs incurred *after* the date of sale, when the direct relationship was established. *See, e.g.*, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,049 (Comment 33) (Dep't Comm. 1989) (final determination); Television Receivers, Monochrome and Color, from Japan, 53 Fed. Reg. 4050, 4052 (Comment 18) (Dep't Comm. 1988) (final results); Color Television Receivers from Korea, 53 Fed. Reg. 24,975, 24,988 (Comment 72) (Dep't Comm. 1988) (final results); Kraft Condenser Paper from Finland, 47 Fed. Reg. 3813 (Dep't Comm. 1982) (final results). Pre-sale transportation expenses were treated as "indirect expenses," deductible from FMV only when ESP was used as the basis for the United States price. *See* 19 C.F.R. § 353.41(e)(2) (1993). In the case at bar, however, Commerce altered this practice and deducted pre-sale inland freight expenses while conducting a purchase price, rather than the exporter's sale price, comparison. In the present case, Commerce does not rely on the circumstances of sale provision, but on its inherent

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[7] This provision states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
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> . . . .
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> (B) other differences in circumstances of sale; . . .
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> . . . .
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> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (1988).

power as the administering authority to fill "gaps" in the statutory framework in reasonable ways consistent with the objectives of the antidumping law.[8]

Commerce argues, and the Court of International Trade agreed, that it has the discretion to deduct home-market transportation costs from foreign market value because the statute is silent and doing so furthers its primary goal when calculating FMVs and USPs of comparing "apples with apples," i.e., comparing prices of merchandise in the United States with those in the foreign market at a similar point in the chain of commerce. *Ad Hoc Comm.*, 787 F. Supp. at 212-13 (citing *Smith-Corona*, 713 F.2d at 1578). The deduction from FMV, when combined with the statutorily mandated deduction from USP, means that on both sides, ex-factory prices will be the basis for comparison. *Id.* Without the deduction from FMV, the comparison is apples to oranges: ex-factory prices in the United States but the *ex-warehouse* price in the foreign market.

The Ad Hoc Committee disputes the initial premise that the statute is silent. In its view, the fact that the deduction is included in the provisions for USP but not for FMV means that Congress did not intend for home-market transportation costs to be deducted.

III.

It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d

[8] Although intervenors urge that we affirm the Court of International Trade judgment under the "circumstances of sale" provision, we decline the invitation. It is well settled that an agency's action may not be upheld on grounds other than those relied on by the agency. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

720, 722 (5th Cir. 1972)); *see also United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir.), *cert. denied*, 492 U.S. 924 (1989); *Arizona Elec. Power Cooperative, Inc. v. United States*, 616 F.2d 1366, 1375 (9th Cir. 1987). Absent strong evidence to the contrary, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

The applicability of this principle was made clear in *Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993), where we held that Commerce erred when it adjusted both the USP and the FMV to account for Japanese commodity taxes that were collected on merchandise sold in Japan, but not collected on merchandise exported to the United States. We noted that 19 U.S.C. § 1677a(d)(1)(C) (1988) explicitly requires Commerce to increase USP by the amount of taxes that the exporting country would have assessed on the merchandise if it had been sold in the home market. *Zenith*, 988 F.2d at 1580. Commerce applied the circumstances of sale provision to adjust FMV in an effort to achieve tax neutrality in its comparisons, reasoning that adjusting USP to account for the forgiven commodity tax would cause an increase in the dumping margin not directly related to less-than-fair-value sales. *Id.* at 1578. We rejected this approach, concluding that "[t]he Act is not silent about the disparity created between FMV and USP when a foreign government forgives commodity taxes on exports. Section 1677a(d)(1)(C) expressly directs Commerce to adjust USP. In the face of an unambiguous statutory directive, Commerce may only effect tax adjustments under that section." *Id.* at 1582.

In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear.

FMV and USP are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.[9]

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[9] The language of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921), provides strong support for this conclusion. In the original Act, mention of transportation costs is even more conspicuously absent from the FMV provision than it is today. The Act defines "purchase price," what has since 1980 been part of USP, as being the agreed upon price for the merchandise:

> plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, *less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States* . . . .

Id. § 203 (emphasis added). Foreign market value is defined in part with the *identical* language, but without any mention of shipping costs. *Id.* § 205. Thus, FMV is the ordinary home market price:

> plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person

IV.

In reaching its decision, the Court of International Trade upheld Commerce's interpretation of § 1677b in part because it was "loath to tell ITA it cannot be more fair than it has been in the past when the statute would seem to allow it some room to make the fairer choice." 787 F. Supp. at 213. Thus, the court urged that deduct-

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by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase.

Id. Even given the vagaries of the legislative drafting process, it is impossible to imagine that Congress unintentionally included the same phrasing in the two passages only up to the point where the deduction for transportation costs from USP was discussed. The omission of the transportation cost deduction from FMV seems fully intended.

Since passage of the original Act, the antidumping laws have been amended and the continuity of the identical phrasing has been eliminated, but the substance of today's USP and FMV statutes remains unchanged. Indeed, despite two significant amendments to the antidumping laws in the past ten years—in the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984), and in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988)—Congress has not altered the Act's treatment of home market transportation costs. Congress has not done so, even though it was advised by Commerce in its 1985 "Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change" that Commerce believed it lacked statutory authorization to deduct home market transportation costs from FMV. That Congress knew of the agency's prior interpretation of the Act and, despite twice amending other Act provisions, did nothing to change the interpretation or the statutory language on which it was based is persuasive evidence that the agency's prior interpretation was the one intended by Congress. *See Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1522 (Fed. Cir. 1993); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1105-06 (Fed. Cir. 1990) (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)). In such circumstances, we cannot attribute the difference between the statute's treatment of transportation costs under the USP and FMV provisions to Congressional inadvertence or inattention.

ing pre-sale home transportation costs from FMV "engenders a more accurate and meaningful comparison," *id.*, and better serves Commerce's "primary goal" of comparing "apples with apples," *id.* at 212 (citing *Smith-Corona*, 713 F.2d at 1578). Under *Chevron*[10] and its progeny, however, courts do not consider the reasonableness of an agency's interpretation of a statute unless the relevant statute is silent or ambiguous on the question at hand. *See Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 398 (Fed. Cir. 1990). The general prescriptions of *Smith-Corona*, which serve to guide Commerce in making reasonable interpretations of the Antidumping Act, do not apply where the Act itself clearly expresses the intent of Congress. *Zenith*, 988 F.2d at 1582. Because we believe the antidumping statute is not silent on the question of pre-sale home-market transportation cost deductions from FMV, therefore, the reasonableness or fairness of Commerce's interpretation of the Antidumping Act is irrelevant.

Even if the statute's "primary goal" may seem to be ill-served by not allowing the deduction from FMV, that conclusion does not justify reading into the statute agency discretion that clearly is not there. As the Supreme Court stated in *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam):

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525-26. Congress acts through bargaining and compromise; legislation frequently includes provisions that are not entirely consistent with the general statutory

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[10] *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

purpose. In *Glaxo Operations UK Limited v. Quigg*, 894 F.2d 392 (Fed. Cir. 1990), we rejected a claim that the Commissioner of Patents and Trademarks' interpretation of 35 U.S.C. § 156 was more consistent with the general purpose of the Act of which it was a part than the plain statutory language. We concluded:

> We simply cannot say that the plain meaning of section 156 would provide unwanted results because Congress may very well have contemplated all the ramifications of its chosen definition in light of the political realities as seen played out in the legislative process, and we must assume it did.

Glaxo, 894 F.2d at 397. We make a similar assumption here. Congress may have wanted the differential for any of a number or reasons, the most evident of which being to increase the likelihood and size of dumping margins found by Commerce. Whatever the reason, it is not this court's role to substitute its view of the statute's purpose for the plain language, or conspicuous lack thereof, in the statute.

Finally, we note that the result of giving effect to the lanuage of the statute by denying the deduction of home-market transportation costs from FMV are not so "absurd" as to justify departure under such cases as *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984) and *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Ambassador*, we held that applying the plain statutory language of two tariff provisions, passed together in *pari materia*, would result in one provision frustrating or partially repealing the other. *Id.* at 1565. No such conflict occurs here. Deduction of transportation costs from USP but not FMV creates a *different* comparison than would obtain if the costs were deducted from FMV as well, but neither provision frustrates the operation of the other. As indicated by the fact that Commerce applied the deduc-

tion to USP alone for more than a decade without disastrous consequences, the plain language does not lead to absurd results.

V.

For the foregoing reasons, the judgment of the Court of International Trade with respect to Commerce's deduction of pre-sale home-market transportation costs from FMV is reversed. The case is remanded with direction that Commerce recalculate the dumping margins involved in this case without such deductions.

Costs award to plaintiff-appellant.

REVERSED AND REMANDED.

UNITED STATES COURT OF
INTERNATIONAL TRADE

No. 90-10-00508

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff,

v.

UNITED STATES,
Defendant,

and

APASCO, S.A. DE C.V., AND CEMEX, S.A.,
Defendant-Intervenors.

March 5, 1992

OPINION

RESTANI, Judge:

Plaintiff, an association composed of United States producers of gray portland cement and cement clinker with production facilities in Arizona, New Mexico, Texas and Florida, challenges the final determination of sales at less than fair value by the United States Department of Commerce, International Trade Administration ("ITA" or "Commerce") in *Gray Portland Cement and Clinker from Mexico*, 55 Fed.Reg. 29,244 (Dep't Comm.1990) ("Final Determination" or "Final Det."). In the determination, ITA concluded that imports of gray portland

cement and clinker from Mexico are being, or are likely to be, sold in the United States at less than fair value ("LTFV"). Plaintiff, representing domestic cement producers, challenges the level of LTFV margins. Cemex, S.A. ("Cemex") and Apasco, S.A. de C.V. ("Apasco"), Mexican producers of the subject merchandise, are defendant-intervenors in this action.

I. Background

In response to a petition filed by plaintiff on behalf of the domestic cement industry, ITA initiated an antidumping investigation of imports of gray portland cement and cement clinker from Mexico. *Gray Portland Cement and Clinker from Mexico,* 54 Fed.Reg. 43,190 (Dep't Comm. 1989).

On April 12, 1990, by notice published in the *Federal Register*, ITA issued a preliminary affirmative determination of sales at less than fair value. *Gray Portland Cement and Clinker from Mexico,* 55 Fed. Reg. 13,817 (Dep't Comm.1990). Following verification of the questionnaire responses, ITA published its final affirmative determination of sales at less than fair value. Final Det., 55 Fed.Reg. 29,244.

On August 30, 1990, an antidumping duty order was published in the *Federal Register. Gray Portland Cement and Clinker from Mexico,* 55 Fed.Reg. 35,443 (Dep't Comm.1990).[1] In this order, Cemex was assigned a final

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[1] On November 13, 1989, the United States International Trade Commission ("ITC") published its preliminary finding that a domestic industry was materially injured by reason of imports of this cement. *Gray Portland Cement and Cement Clinker from Mexico,* USITC Pub. 2235, Inv. No. 731-TA-451 (Nov. 1989). In August 1990, ITC published its final affirmative determination. *Gray Portland Cement and Cement Clinker from Mexico,* USITC Pub. 2305, Inv. No. 731-TA-451 (Aug. 1990). The material injury determination is before this court in *Cemex, S.A. v. United States,* Court No. 90-10-00509.

dumping margin of 58.38% and Apasco—53.26% A third Mexican producer not a party in this appeal, Cementos Hidalgo, S.C.L., was assigned a dumping margin of 3.69%. The "all other" category of Mexican producers and exporters of the subject merchandise received a dumping margin of 58.05%.

II. Issues and Decision

Plaintiff raises three issues:

1. Whether ITA erred by comparing Cemex's home market and United States sales at two distinct levels of trade;

2. Whether ITA erred by deducting home market inland freight charges incurred by Cemex and Apasco from foreign market value ("FMV"); and

3. Whether ITA erred by not initiating a sales below cost of production ("COP") investigation of Cemex's home market sales of Type V cement.

Oral argument was held on February 20, 1992. At that time, the court ordered remand on the first issue and upheld ITA's decision on issues two and three. This opinion further explains the court's ruling from the bench.

III. Discussion

A. Remand is necessary for ITA to explain its rationale for comparing Cemex's home market and United States sales at different levels of trade.

The "level of trade" regulation provides:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on

> sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and make appropriate adjustments for differences affecting price comparability.

19 C.F.R. § 353.58 (1991). Authority for this regulation is found in the statutory provision mandating adjustments to foreign market value for "other differences in circumstances of sale." 19 U.S.C. § 1677b(a)(4)(B) (1988).

During the period of the investigation, Cemex maintained that its pricing policies for sales of the subject merchandise did not vary according to the type of customer or the level of trade. Pub.R.Doc. 126 at 12. Rather, Cemex attributed price variance to the differing competitive conditions in different sales regions. *Id.* In the preliminary determination ITA treated all home market sales as if they were made at a single level of trade. *See* 55 Fed.Reg. 13,817.

On June 13, 1990, Cemex raised the level of trade issue with ITA, arguing that ITA should not combine the sales to distributors with the sales to end-users in making the fair value comparison. Pub.R.Doc. 269 at 937-38. In comment 9 of its final determination, ITA stated: "[W]e determined that CEMEX had sufficient sales in the home market at the same commercial level of trade as its U.S. sales to permit an adequate comparison to all U.S. sales." Final Det. at 29,248. This statement is ambiguous. It does not reflect that ITA found two distinct levels of trade in each market and that it chose to make comparisons on two different levels, although the parties seem to agree that ITA did make separate comparisons. Absent from the final determination is an explanation of why ITA reversed its preliminary determination which combined distributor and end-user sales. Although ITA consents to remand to consider this issue anew, plaintiff requested that ITA be directed to follow its preliminary methodology.

As the court stated at oral argument, the level of trade issue must be remanded so that ITA may explain its analysis and rationale for concluding that Cemex's sales should be compared at two different levels of trade based on the evidence submitted in this case. The court declines to give further direction in view of the absence of reasoning and the presence of some evidence of two levels of trade. This issue requires further consideration by the agency before the court can make a determination as to ITA's level of trade methodology.

B. It was reasonable for ITA to deduct pre-sale inland freight expenses from FMV.

In its final determination, ITA deducted from FMV inland freight expenses that were incurred prior to the date of sale, stating:

> We have deducted from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an "apples-to-apples" comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV.

Final Det. at 29,251 (Comment 27). Plaintiff alleges that this deduction is contrary to ITA's standard practice of denying direct expense deductions to FMV for presale inland freight charges and further, that the new procedure violates the anti-dumping law.

Pursuant to statute and regulation, ITA must reduce the United States price by any expenses "incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A) (1988); 19 C.F.R. § 353.41(d)(2)(i) (1991). No corresponding provision exists with regard to FMV. Under 19 U.S.C. § 1677b(a)(4)(B) and the implementing regulation, however, FMV may be adjusted for differenences

in the circumstances of sale that are directly related to sales of the merchandise in the home market.[2]

Although Cemex and Apasco argue that ITA's determination is sustainable based on the circumstances of sale provision because the expenses are directly related to the sales, ITA did not rely on this provision in its treatment of home-market pre-sale inland freight expenses. Thus, ITA's determination as to this issue rests not on the circumstances of sales adjustment historically used by ITA,[3] but on a seemingly new approach that uses prices

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[2] 19 U.S.C. § 1677b(a)(4) (1988) provides, in part, as follows:

> (4) Other adjustments
>
> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
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> . . . .
>
> (B) other differences in circumstances of sale;
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> . . . .
>
> then due allowance shall be made therefor.

The ITA regulation which implements this circumstance of sale provision provides as follows:

> (a) *In general.* (1) In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference. In general, the Secretary will limit allowances to those circumstances which bear a *direct relationship* to the sales compared.

19 C.F.R. § 353.56(a)(1) (1991) (emphasis added in last sentence).

[3] Defendant admits, and a review of ITA determinations indicates, that in the past ITA, when U.S. purchase price is involved, has refused to grant a circumstance of sale adjustment to FMV for pre-sale inland freight charges, instead it has treated these expenses as nonallowable indirect selling expenses. *See* Defendant's Brief at 18; *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 18,416, 18,418 (Dep't Comm.1980) (final admin. review) (no

at the factory gates for comparison, which necessarily would involve inland freight deductions on both sides of the equation.

In this case, pre-sale movement expenses were incurred in both the home market and the United States market. The similarity of selling procedures in both markets distinguishes this case from prior ones discussing pre-sale costs. *See Silver Reed America, Inc. v. United States*, 7 CIT 23, 581 F.Supp. 1290 (1984), *rev'd on other grounds sub nom., Consumer Prod. Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033 (Fed.Cir.1985); *LMI-La. Metalli Industriale, S.p.A. v. United States*, 13 CIT 305, 712 F.Supp. 959 (1989), *aff'd in part, rev'd in part*, 912 F.2d 455 (Fed.Cir.1990). In both of these cases, pre-sales expense deductions were discussed only with regard to the home market side; thus, it was only the circumstances of sale provision which could justify a deduction.

Plaintiff views ITA's new approach as a circumvention of the circumstances of sale provision. The court doubts a circumvention is occurring because it would appear to be an unnecessary one. The court does not find the clarity in the circumstances of sale provision that is apparent to plaintiff. The obvious thrust of the statute is a fair comparison. The absence of language addressing a

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adjustment for the costs of transporting subject merchandise from factory to distribution warehouse because expense not directly related to particular sale); *Television Receivers, Monochrome and Color, from Japan*, 53 Fed.Reg. 4,050, 4,052 (Dep't Comm.1988) (final admin. review) (home market inland freight costs incurred before date of sale treated as indirect selling expense); *Color Television Receivers from the Republic of Korea*, 55 Fed.Reg. 26,225, 26,230 (Dep't Comm.1990) (final admin. review) (inland freight expense should be treated as indirect selling expense). Although they are capped at the U.S. expense level, as a general matter indirect selling expenses are allowed as an adjustment to FMV if exporter's sales price is used on the U.S. side of the equation. *See* 19 C.F.R. § 353.56(b)(2) (1991). This case, however, involves purchase price, not exporter's sales price.

movement deduction in the FMV statute suggests no hard and fast rule to the court in view of Congress' broad direction to make adjustments for differences in circumstances of sale and its lack of direction as to which exact price factors to use. Even ITA's regulation is not as absolute as plaintiff would imply; ITA prefaces its direct expenses deduction rule with the words "In general." *See* 19 C.F.R. § 353.56(a)(1).

The court also notes that it cannot find the clear line between pre-sale and post-sale expenses that places all pre-sale expenses in the "indirect expense" category—a line so evident to the court in *Silver Reed* and used by ITA in the past.[4] If ITA's approach was reasonable in *Silver Reed*, the court finds the new approach, with its concentration on a level playing field, even more reasonable. In fact, cases since *Silver Reed* have not used absolute language, but have considered whether ITA's approach was acceptable given the particular facts. *See e.g.*, *LMI*, 13 CIT at 313-14, 712 F.Supp. at 965-66, *aff'd*, 912 F.2d at 457-58.

ITA's primary goal when generating FMVs and United States prices for the purpose of a less than fair value

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[4] In recent cases ITA has permitted a deduction for freight expenses incurred on home market sales. *See e.g., Red Raspberries from Canada*, 56 Fed.Reg. 677 (Dep't Comm.1991) (final admin. review). ITA has explained this change as follows:

> In the past, the Department has treated pre-sale movement expenses incurred on home market sales as either production costs or indirect selling expenses. However, we have reconsidered our treatment of these expenses. The Department does not distinguish between pre-sale and post-sale movement charges when calculating an ex-factory U.S. price. Therefore, to ensure an "apples-to-apples" comparison, the Department has deducted all movement charges, pre-sale and post-sale, from foreign market value.

Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan, 56 Fed.Reg. 26,054, 26,056 (Dep't Comm.1991) (final admin. review).

determination is to compare "apples with apples." *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed.Cir.1983).[5] As the Federal Circuit explained in *Smith-Corona*, a "fair comparison" is required. *Id.* In the case at bar, ITA reasoned that to obtain an "apples to apples" comparison, the ex-factory price in the United States should be compared to the ex-factory, not the ex-warehouse, price in the home market. The court is loath to tell ITA it cannot be more fair than it has been in the past when the statute would seem to allow it some room to make the fairer choice. The deduction of pre-sale inland freight expenses on the home market side engenders a more accurate and meaningful comparison in this case than does plaintiff's approach or any absolute rule based on pre-and post-sale costs. ITA's determination is sustained on this issue.

C. ITA's decision not to initiate a cost of production investigation of Cemex's Type V cement sales is sustained.

During the investigation, plaintiff requested that ITA initiate a sales below cost of production ("COP") investigation with respect to Cemex's home market sales of Type V cement. ITA rejected this request stating:

> Because such sales [of Type V cement] comprise less than [][6] percent of the relevant "such or similar" category, we would not disregard any of these sales for purposes of calculating foreign market value (FMV) even if we were to find all of these sales to be sold below cost. This [] percent volume

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[5] Although plaintiff argues that the "apples-to-apples" policy argument set forth in *Smith-Corona* involved an offset to exporter's sales price, the principle is a general one which has application for all dumping comparisons.

[6] Although this figure is confidential, the parties noted in oral argument that it was a very small number. The court would call it miniscule.

> falls far short of the quantitative threshold that we evaluate, among other factors, to determine whether to disregard below cost sales. *See Timken Co. v. United States*, [11 CIT 786, 806-07], 673 F.Supp. 495, 514-515 (CIT 1987).
>
> Because we could never achieve the intended purpose of the COP statutory provisions in this case, *i.e.*, the exclusion of below cost sales for FMV purposes, initiating a cost investigation under these circumstances would be a futile exercise.

Pub.R.Doc. 182 at 1808-09.

Plaintiff argues on appeal that ITA calculated a separate FMV for home market sales of Type V cement apart from the FMVs calculated for other cement types and therefore, ITA should have examined the COP for Type V cement standing alone. Plaintiff alleges that all or almost all of the Type V cement sales were below cost.

19 U.S.C. § 1677b(a)(1) (1988) provides that "[t]he foreign market value of imported merchandise shall be the price . . . at which such or similar merchandise is sold [in the home market]. . . ." 19 U.S.C. § 1677b(b) (1988) provides in part as follows:

> Whenever . . . [ITA] has reasonable grounds to believe or suspect that *sales in the home market* of the country of exportation . . . have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If . . . [ITA] determines that sales made at less than cost of production—
>
> (1) have been made over an extended period of time and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade

> such sales shall be disregarded in the determination of foreign market value.

(emphasis added). In other words, in order to disregard sales made below COP, ITA must find that the relevant sales were made in "substantial quantities" and over an extended period of time.[7] *Id.* The regulation implementing this statute, 19 C.F.R. § 353.51 (1991), reads as follows:

> (a) *Disregarding sales at less than cost.* If the Secretary has reasonable grounds to believe or suspect that the *sales on which the Secretary could base the calculation of foreign market value* . . . are at prices less than the cost of production, the Secretary, in calculating foreign market value, will disregard such sales if they:
>
> (1) Have been made over an extended period and in substantial quantities; and
>
> (2) Are not at prices which permit recovery of all costs within a reasonable period in the normal course of trade.

(emphasis added).

The question is which group of sales is at issue—the full "such or similar merchandise" group of sales or a particular subcategory of "such or similar merchandise," that is, "the sales on which the Secretary could base the calculation of foreign market value." In this case, a sepa-

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[7] ITA practice is not to disregard below COP sales if they "constitute 10 percent or less of total home market sales of the such or similar category of merchandise." *Tubes for Tires, Other than for Bicycle Tires, From the Republic of Korea*, 49 Fed.Reg. 26,780, 26,782 (Dep't Comm.1984) (final admin. review). In *Timken Co. v. United States*, 11 CIT 786, 673 F.Supp. 495 (1987), the court concluded that ITA's practice of disregarding below-cost sales that represent less than ten percent of total home market sales was a reasonable interpretation of the term "substantial quantities." *Id.* at 806-07, 673 F.Supp. at 514-15.

rate FMV for Type V sales was calculated by Commerce. Only the Type V FMV was used in making the fair value comparisons between Cemex's Type V cement sales in the United States and those in the home market. Thus, the sales used by Commerce for calculating FMV for Type V cement were the Type V home market sales which were alleged to be below COP.

ITA's statement of reasons in its determination causes the court some concern. Because it has subdivided the "such or similar merchandise" for purposes of price comparisons, it could be basing a part of the margin on a price-based FMV that should have been replaced by a cost-based FMV. The ten percent rule used in the past has been approved in the context of a unitary "such or similar merchandise" category. *See Timken*, 11 CIT at 806-07, 673 F.Supp. at 514-15. Thus, the court has not previously approved ITA's reasoning that even when it subdivides "such or similar merchandise" for FMV and U.S. price comparison purposes, it may nonetheless re-aggregate the "such or similar" category for purposes of its ten percent rule. The court leaves this issue for another day because, whatever the correct approach, it would not order ITA to undertake a COP investigation in this fair value investigation.

The court made it clear at oral argument that, in view of the miniscule amount of Type V cement imported into the United States, it was interested in any evidence indicating that the margin, which applied to all types of cement in the such or similar category, would change if a COP investigation were undertaken as to Type V cement. Plaintiff did not offer evidence that the weighted average might change by even one-hundredth of a decimal point if ITA undertook a COP investigation of the Type V cement. While its burden of showing potential for a margin change may not be great given its lack of access to particularized cost data, under these circumstances some showing was needed. Given the uncontradicted

statements of the defendant that the margin would not change, the court concludes a COP investigation would be useless at this stage and need not be undertaken.

IV. Conclusion

Remand is required as to the level of trade issue and ITA is directed to explain its rationale for whatever approach it chooses. The court concludes that it was reasonable for ITA to deduct pre-sale inland freight expenses from FMV because such a deduction would permit an accurate comparison of United States price and FMV and the statute and regulations do not prevent such deduction under the facts of this case. ITA's decision not to initiate a COP investigation will not be disturbed where the number of sales alleged to be below cost was so insignificant as compared to the total number of sales that no margin change could be expected.

Remanded.

[A-201-802]

Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker From Mexico

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that imports of gray portland cement and clinker from Mexico are being, or are likely to be, sold in the United States at less than fair value. We also determine that critical circumstances do not exist with respect to imports of gray portland cement and clinker from Mexico.

We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to continue to suspend liquidation of all entries of gray portland cement and clinker from Mexico, as described in the "Continuation of Suspension of Liquidation" section of this notice. The ITC will determine, within 45 days of the publication of this notice, whether these imports materially injure, or threaten material injury to, the U.S. industry.

EFFECTIVE DATE: July 18, 1990.

FOR FURTHER INFORMATION CONTACT: Louis Apple or Brad Hess, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377-1769 or 377-3773 respectively.

SUPPLEMENTAL INFORMATION:

Final Determination

We determine that imports of gray portland cement and clinker from Mexico are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act). The estimated weighted-average margins are shown in the "Continuation of Suspension of Liquidation" section of this notice.

Case History

Since publication of the preliminary determination (55 FR 13817, April 12, 1990), the following events have occurred. On April 9, 1990, respondent CEMEX, S.A. (CEMEX) requested that we postpone making our final determination for a period of 21 days pursuant to section 735(a)(2)(A) of the Act. On April 20, 1990, we published a notice postponing the final determination until July 10, 1990 (55 FR 14989).

On April 19, 1990, petitioner alleged that critical circumstances exist. On May 25, 1990, we published a preliminary finding that critical circumstances do not exist (55 FR 21639).

We verified the questionnaire responses in Mexico from April 23 to May 4, 1990, and in Phoenix, Arizona and Buda, Texas from May 21 to May 22, 1990.

On June 8, 1990, petitioner and respondents CEMEX and Apasco, S.A. de C.V. (Apasco) withdrew their requests for a hearing.

Petitioner and respondents CEMEX and Apasco submitted comments for the record in case briefs dated June 13, 1990, and in rebuttal briefs dated June 18, 1990.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules were fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered or withdrawn from warehouse for consumption on or after this date is now classified solely according to the appropriate HTS subhearings. The HTS subheadings are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The products covered by this investigation include gray portland cement and clinker. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material produced when manufacturing cement, has no use other than that of being ground into finished cement.

Gray portland cement is currently classifiable under HTS item number 2523.29, and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as "other hydraulic cements".

Period of Investigation

The period of investigation (POI) is April 1, 1989 through September 30, 1989.

Such or Similar Comparisons

Pursuant to section 771(16)(C) of the Act, we established two categories of "such or similar" merchandise: gray portland cement and clinker.

Product comparisons were made on the basis of standards established by the American Society for Testing Materials (ASTM standards). All of the cement sold during

the POI falls within the following three ASTM standards: Type I, Type II, and Type V cement. We compared U.S. sales of bagged cement to home market sales of bagged cement, and we compared U.S. sales of bulk cement to home market sales of bulk cement.

CEMEX and Cementos Hidalgo had no sales of clinker in the United States during the POI. Apasco sold clinger to the United States during the POI, but did not sell clinker in either the home or third country markets. Because of the small volumes involved, we did not use sales of clinker in our analysis.

For cement, all respondents sold identical merchandise (*i.e.*, types of cement) in the home market with which to compare merchandise sold in the United States.

In order to determine whether there were sufficient sales of gray portland cement in the home market to serve as the basis for calculating foreign market value (FMV), we compared the volume of home market sales of cement to the volume of third country sales of cement, in accordance with section 773(a)(1) of the Act. All respondents had sufficient home market sales.

Fair Value Comparisons

To determine whether sales of gray portland cement and clinker from Mexico to the United States were made at less than fair value, we compared the U.S. price to the FMV, as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

For CEMEX, we based U.S. price on purchase price where sales were made directly to unrelated parties prior to importation into the United States, in accordance with section 772(b) of the Act. Where sales to the first unrelated purchaser took place after importation into the United States, we based U.S. price on exporter's sales

price (ESP), in accordance with section 772(c) of the Act. For Apasco and Cementos Hidalgo, we based U.S. price on purchase price, because all sales were made directly to unrelated parties prior to importation into the United States.

CEMEX

For CEMEX, we calculated purchase price based on packed, f.o.b. mid-bridge or c.i.f. prices. We made deductions, where appropriate, for discounts and rebates, foreign inland freight, ocean freight, Mexican brokerage, and U.S. brokerage. In accordance with section 772(d)(2)(A) of the Act, we made an additional deduction for U.S. excise taxes and merchandise processing fees. In accordance with section 772(d)(1)(C) of the Act, we added to the U.S. price the amount of value added tax (VAT) that would have been collected on the export sale had it been subject to the tax. We computed the hypothetical amount of the VAT added to the U.S. price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

We calculated ESP based on packed, f.o.b. terminal or c.i.f. prices. We made deductions, where appropriate, for discounts and rebates, foreign inland freight, U.S. inland freight, ocean freight, Mexican brokerage, and U.S. brokerage. In accordance with section 772(d)(2)(A) of the Act, we made an additional deduction for U.S. excise taxes and merchandise processing fees. In accordance with section 772(e)(2) of the Act, we made additional deductions, where appropriate, for credit expenses, packing expenses incurred in the United States, and indirect selling expenses consisting of inventory carrying costs and general indirect selling expenses incurred in Mexico and the United States. We calculated CEMEX's inventory carrying cost using the Mexican interest rate for the Mexican portion of the calculation. We made additons, where

appropriate, for revenue for special delivery charges. In accordance with section 772(d)(1)(C) of the Act, we added to the U.S. price the amount of VAT that would have been collected on the export sale had it been subject to the tax. We computed the hypothetical amount of the VAT added to the U.S. price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

CEMEX reported that some of the cement sold underwent further manufacturing. Because of the small quantity involved, we did not include these sales in our analysis.

Apasco

For Apasco, we calculated purchase price based on the f.o.b. Mexican port price. We made deductions for discounts, foreign inland freight, foreign inland insurance, Mexican brokerage, demurrage, truck loading cost, and ship loading cost. We did not adjust FMV for reported technical service expenses as a direct selling expense, because we could not verify that these expenses were directly related to sales of the subject merchandise. In accordance with section 772(d)(1)(B) and (C) of the Act, we added to the U.S. price the amount of rebated duties and the amount of VAT that would have been collected on the export sale had it been subject to the tax. We computed the hypothetical amount of the VAT added to the U.S. price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

Cementos Hidalgo

For Cementos Hidalgo, we calculated purchase price on the packed, f.o.b. plant or c & f price. We made deductions for ocean and foreign inland freight. In accordance with section 772(d)(1)(C) of the Act, we added to the U.S. price the amount of VAT that would have been

collected on the export sale had it been subject to the tax. We computed the hypothetical price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we calculated FMV based on home market sales.

CEMEX

For CEMEX, we calculated FMV based on packed, f.o.b. ex-factory or c.i.f. prices to unrelated and related customers in the home market. We used the related party sales, because the prices to related parties were at or above the prices to unrelated parties and, therefore, were determined to be at arms-length.

We made deductions, where appropriate for discounts, rebates, and inland freight. Where appropriate, we added packing revenue and handling revenue. For comparisons of bagged cement, we deducted home market packing costs from the FMV and added to FMV U.S. packing costs incurred in Mexico.

Pursuant to § 353.56 of the regulations (19 CFR 353.56), we made circumstance of sale adjustments, where appropriate, for differences in credit expenses on purchase price sales. For ESP sales, we deducted credit expenses from U.S. price.

We made a circumstance of sale adjustment in accordance with section 773(a)(4)(B) of the Act to eliminate any differences in taxation between the two markets. Because home market prices were net of VAT, this adjustment was made by adding the hypothetical tax on the U.S. sale to both the U.S. price and the FMV.

For comparisons to ESP sales, we made additional deductions from the FMV for home market indirect selling expenses, which consisted of general indirect selling ex-

penses and inventory carrying costs. We capped the amount deducted for indirect selling expenses incurred in the home market by the amount of indirect selling expenses incurred on sales in the U.S. market, in accordance with § 353.56(b)(2) of our regulations (19 CFR 353.56).

Apasco

For Apasco, we calculated FMV based on f.o.b. plant, pickup point or customer facility prices to unrelated customers in the home market.

We made deductions, where appropriate, for discounts, inland freight, inland insurance, and loading costs. Because all U.S. sales were sales of bulk cement, we used only sales of bulk cement in the home market for our comparisons. Therefore, no packing charges were deducted.

We made circumstance of sale adjustments, where appropriate, for differences in credit expenses, advertising and after-sale storage facilities pursuant to § 353.56 of the regulations (19 CFR 353.56). We made additions for interest revenue for early payments made on certain sales. We did not allow reported technical service expenses as a direct selling expense, because we could not verify that this expense was directly related to sales of the subject merchandise.

We made a circumstance of sale adjustment in accordance with section 773(a)(4)(B) of the Act to eliminate any differences in taxation between the two markets. Because home market prices were net of VAT, this adjustment was made by adding the hypothetical tax on the U.S. sale to both the U.S. price and the FMV.

Cementos Hidalgo

For cementos Hidalgo, we calculated FMV based on packed, f.o.b. plant or c & f prices to unrelated customers in the home market.

We made deductions, where appropriate for discounts and inland freight. For comparisons of bagged cement, we deducted home market packing costs from the FMV and added to FMV U.S. packing costs.

Where appropriate, we made circumstance of sale adjustments for differences in credit expenses and bank fees pursuant to section 353.56 of the regulations (19 CFR 353.56). Since Cementos Hidalgo did not report the bank fees, we resorted to best information available and used the highest verified bank fees on U.S. sales. We also recalculated the U.S. credit expense using the actual credit days on the sales verified. Since the credit days were underreported on all verified sales, we have used the average credit day period of the verified U.S. sales as best information available in our calculation of credit expense on all other U.S. sales.

We made a circumstance of sale adjustment in accordance with section 773(a)(4)(B) of the Act to eliminate any differences in taxation between the two markets. Because home market prices included VAT, this adjustment was made by subtracting VAT from home market prices then adding the hypothetical tax on the U.S. sale to both the U.S. price and the FMV.

Currency Conversion

When calculating FMV, we typically make currency conversions in accordance with § 353.60 of our regulations (19 CFR 353.60), using the exchange rates certified by the Federal Reserve Bank of New York. Since the Federal Reserve Bank of New York did not provide any exchange rates information for Mexico during the period of this investigation, we used the average monthly exchange rates for Mexico published by the International Monetary Fund as a reasonable surrogate for the Federal Reserve exchange rates.

Critical Circumstances

Petitioner alleges that "critical circumstances" exist with respect to imports of gray portland cement and clinker from Mexico. Section 733(e)(1) of the Act provides that critical circumstances exist when we determine that there is a reasonable basis to believe or suspect the following:

(1) That there is a history of dumping of the same class or kind of merchandise, or that the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise at less than fair market value, and

(2) That there have been massive imports of the subject merchandise over a relatively short period.

To determine whether imports have been massive over a relatively short period, we based our analysis on respondents' shipment data for equal periods immediately preceding and following the filing of the petition.

Pursuant to § 353.16(f) and (g) of our regulations, we examined the period beginning in the month following the month in which the petition was filed and ending in the month in which we published our preliminary determination. Because the petition was filed near the end of the month of September, we selected the following month as the beginning of the base period.

We then compared the quantity of imports during the base period over the imports during the immediately preceding period of comparable duration for each of the respondents. We found that shipments from none of the respondents had increased by at least 15 percent during the base period in accordance with 19 CFR 353.16(f)(2). Based on the above, we find that imports of gray portland cement and clinker from Mexico have not been massive over a relatively short period.

Since we do not find that there have been massive imports, we need not consider whether there is a history

of dumping or whether importers of this merchandise knew or should have known that such merchandising was being sold at less than fair value. Therefore, we find that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to imports of gray portland cement and clinker from Mexico.

Verification

As provided in section 776(b) of the Act, we verified all information used in reaching the final determination in this investigation. We used standard verification procedures, including examination of relevant accounting records and original source documents provided by respondents.

Interested Party Comments

Comment 1

Petitioner argues that the Department should treat CEMEX and Cementos de Chihuahua (CDC) as one respondent as was done in the preliminary determination, because the companies are closely intertwined and transactions take place between the companies.

DOC Position

We agree. We determine that CDC and CEMEX do not constitute separate manufacturers or exporters for purposes of the dumping law. The administrative record establishes a close, intertwined relationship between CDC and CEMEX based on their corporate organization and ownership. CDC is predominantly owned by CEMEX, and the companies share common boards of directors. Moreover, CDC and CEMEX have conducted transactions between themselves during the POI. Finally, the production equipment at both companies consist of the same type of equipment so it would not be necessary to retool either company's facilities to shift production. Therefore, we

have treated CDC and CEMEX as one respondent and calculated a single weighted-average margin for CEMEX. See, Final Determination of Sales at Less Than Fair Value: Certain Granite Products from Italy 53 FR 27187, 27189 (1988).

Comment 2

Petitioner argues that the Department should reject the response submitted by Cementos Hidalgo, S.C.L., because it was untimely, incomplete, and inaccurate. Petitioner suggests that, as best information available, the Department should use the "all other" rate.

DOC Position

We do not consider Cementos Hidalgo's response to be untimely. It was submitted in final form on the same day that CEMEX's final response was due. The tape was revised shortly thereafter, but it was submitted before the section B and C deficiency response was due for CEMEX. Although there were some home market sales not reported, these sales accounted for only a small percentage of total home market sales. We have used best information available for these sales. We have also used best information available for the bank commissions which were not reported and for the inaccurate credit days for the U.S. sales.

Comment 3

Petitioner argues that the Department should reject Apasco's voluntary response and use the dumping margin alleged in the petition as best information for the final determination.

Petitioner asserts that voluntary respondents, such as Apasco, must meet a higher standard of accuracy and completeness before their responses are accepted. Petitioner argues that because Apasco failed to report certain sales pursuant to contracts, its response has failed

this higher standard. Apasco maintains that its reporting of all sales is complete and that any deficiencies in its submissions have been insignificant.

DOC Position

We disagree with the petitioner. As set forth in Comment 15 and based upon the findings reported in our verification report, we have determined that Apasco's questionnaire response is accurate and complete.

Comment 4

Petitioner argues that the Department should reject all information favorable to CEMEX that was submitted later than one week prior to verification.

DOC Position

We disagree with petitioner. This information merely includes corrections to the database found in preparation for verification. There were minor corrections to factual information already contained in the record of the proceeding.

Comment 5

For Cementos Hidalgo, petitioner argues that the Department should use best information available for unreported U.S. and home market sales. Petitioner suggests the Department use the "all others" margin from the preliminary determination as best information for these sales.

DOC Position

We have used the highest reported home market price as best information available for the unreported home market sales. We did not find any unreported U.S. sales. There was a slight difference in the reported and verified total U.S. quantities, but the amount was so small that it was negligible.

Comment 6

Petitioner argues that the Department should have accepted its allegations and initiated an investigation of sales below the cost of production.

DOC Position

As outlined in our preliminary determination, we rejected petitioner's allegations because, for CEMEX, the allegation was based on one type of cement, sales of which were so few that they would not have been disregarded in our FMV calculations even if we had found all such sales to have been sold below cost. We rejected the allegation regarding Apasco, because the study used as the basis for the allegation did not identify the costs of the specific products manufactured by Apasco that were alleged to be sold below cost.

Comment 7

CEMEX argues that matching products according to how they are sold is contrary to the antidumping statute and prior Department practice. CEMEX maintain [sic] that in our investigation of cyanuric acid (see, Final Determination of Sales at Less than Fair Value: Cyanuric Acide [sic] and its Chlorinated Derivatives from Japan, 46 FR 7424, 7426 (1984)), the Department deemed physically identical merchandise to be comparable even though the merchandise was packaged differently and intended for different customers. Therefore, the Department cannot base its product matches on descriptions of the merchandise as sold. Furthermore, CEMEX argues that Mexican customers are generally indifferent to whether cement is marketed as Type I or Type II cement, and that matching cement by the way it is marketed and invoiced can achieve absurd results, such as placing the same product in more than one identical matching category.

However the comparisons are made, CEMEX maintains that matching within ranges and standards accepted by the industry as set forth by ASTM is necessary, be-

cause it is the only reasonable way to make a comparison of goods when the chemical composition of those goods necessarily varies. With industry standards as the basis for identical matches, CEMEX argues that there can be no adjustments for differences in merchandise in this case.

Petitioner argues that the Department should match merchandise based on the way it is invoiced. Petitioner maintains that the Cyanuric Acid case cited by CEMEX does not support CEMEX's contention that product matches must be based on physical characteristics, because in Cyanuric Acid there was no contention that the products were mislabelled on home market invoices, or that the products were within more than one industry-recognized specification. Furthermore, citing overall higher invoiced prices for Type II cement in the home market, petitioner contends that the Mexican consumers perceive a very real difference between cement types. Finally, petitioner submits that CEMEX cannot argue that ASTM standards for cement govern identical merchandise issues if it also claims that cement that meets more than one ASTM specification cannot be compared as identical merchandise in either of two appropriate ASTM categories.

DOC Position

We disagree with CEMEX. For merchandise comparisons, section 771(16)(A) of the Act states a clear preference for merchandise which is identical in physical characteristics to the merchandise sold in the United States. Throughout this investigation, both petitioner and CEMEX have noted that customers and producers in both markets rely on ASTM standards to differentiate between products. Furthermore, we note that the Mexican standards and the ASTM standards used in the United States are practically the same. Therefore, we have considered that if a product is sold as merchandise meeting a certain ASTM standard, and in fact the product meets that ASTM standard, it is identical in physical characteristics

to the merchandise sold in Mexico which meets, and is sold as meeting, the same standards.

We have used the invoice to determine the proper ASTM standard, because we verified that the product listed on the invoice met the ASTM standard indicated on the invoice. For example, cement invoiced as Type I cement met the Type I standard, even though it may have also met the Type II standard. We acknowledge that at verification we noted one instance where Type II cement was mistakenly invoiced as Type I cement. However, as the verification report also reveals, this was a mistake and is not the ordinary practice in the industry. Because producers label and sell cement, and customers buy cement based on these standards, we have determined that matching by ASTM standard as invoiced is the most reasonable basis for making equitable identical merchandise comparisons.

Comment 8

Petitioner claims that the Department should make an adjustment for differences in merchandise to account for the extra expense incurred by one CEMEX company for grinding cement. CEMEX argues that since the Department has determined that identical products exist, there is no need for difference in merchandise adjustments.

DOC Position

CEMEX's verified production records confirm that cement ground to slightly different levels of fineness may still meet the same ASTM standards and be sold as identical merchandise. Therefore, and for reasons explained in Comment 7, we have determined that all merchandise within a particular ASTM standard can be compared as identical without adjustments for differences in merchandise.

Comment 9

CEMEX argues that the Department's failure to compare sales at the same level of trade in its preliminary

determination is contrary to the antidumping statute and to the Department's regulations and practice. Petitioner contends that CEMEX's request regarding level of trade is untimely and thereby prevented proper verification. Furthermore, petitioner claims that in its preliminary determination the Department calculated FMV and U.S. price based on sales at the same level of trade.

DOC Position

For our final determination, we determined that CEMEX had sufficient sales in the home market at the same commercial level of trade as its U.S. sales to permit an adequate comparison to all U.S. sales.

However, information concerning level of trade submitted by Apasco and Cementos Hidalgo was not complete enough for us to determine the appropriate levels of trade for Apasco's and Cementos Hidalgo's merchandise comparisons. Therefore, we assumed that all home market sales of the physically identical merchandise were at the same level of trade.

Comment 10

Petitioner argues that CEMEX's shipments to the U.S. that were made during the POI pursuant to long-term Contract 1 should be included in the calculation of the U.S. price, because the material terms of the contract were not fixed until the date of shipment. Petitioner argues, among other things, that there was no definite price term.

CEMEX explains that it made sales to two regions in the United States pursuant to Contract 1 during the POI. CEMEX argues that the price and quantity terms for sales made to both regions were fixed in an oral agreement and a letter that preceded the POI. CEMEX argues that the price term was fixed because there was nothing further to negotiate after the oral agreement. Specifically, CEMEX argues that the formula used to calculate the price

for sales to Region 2 establishes a definite price term in accordance with Department precedent. CEMEX also argues that the quantity term was fixed, because the contract required CEMEX to supply all of its customer's annual requirements.

DOC Position

We disagree with CEMEX in part. In accordance with section 776 of the Act (19 U.S.C. 1677e), which requires the Department to verify all information used in making a final determination, we usually cannot rely upon oral agreements standing alone to establish the date of sale (*see,* Final Determination of Sales at Less than Fair Value: Certain Forged Steel Crankshafts from the Federal Republic of Germany, 52 FR 28,170 (1987)). Although we usually consider the date when the parties execute a long-term contract that establishes definite price and quantity terms as the date of sale (*see,* Final Determination of Sales at Less Than Fair Value: Fall-Harvested Round White Potatoes from Canada, 48 FR 51,669 (1983)), CEMEX presented no evidence during the investigation that established when the parties actually had signed long-term Contract 1. The Uniform Commercial Code, however, recognize [sic] the existence of a contract when the parties have begun performance pursuant to written instruments, such as letters, memoranda, company correspondences, and the like (see also, Certain Forged Steel Crankshafts from the Federal Republic of Germany, *supra*).

In this case, we verified for sales to Region 1 that the parties had begun performance pursuant to a letter agreement, dated before the POI, that establishes definite price and quantity terms. Because we determine under these circumstances that the parties had established definite price and quality terms for sales to Region 1 before the POI, we determine that the date of sale for these shipments precedes the POI. Accordingly, we have not included in our calculations shipments made to Region 1.

For sales to Region 2, however, we verified that the parties did not establish a definite price term before the POI, because a formula contained in the letter agreement noted above required one of the parties to enter into subsequent negotiations to establish the final selling price. Although CEMEX relinquished control over the final selling price after the sale of the subject merchandise to its customer, CEMEX's customer still maintained control over that price through negotiations with its own customers. Because the price term appearing in the letter agreement noted above is not established until CEMEX's customer concludes negotiations with its customers, that term is indefinite and, therefore, not sufficient to establish the date of sale. We consider the date of shipment to be the date of sale under these circumstances and have included in our calculations all shipments that CEMEX made to Region 2 during the POI.

We also disagree with CEMEX's argument that the contract formula used to calculate price for sales to Region 2 establishes a definite price term in accordance with our administrative precedent. In contrast to formulas found to establish a definite price term, CEMEX's formula is not pegged to some external event that would make unnecessary further negotiations by either party to the contract. *See*, Final Determination of Sales at Less than Fair Value: Brass Sheet and Strip from France, 52 FR 812 (1987) (publicly quoted price list); *Voss International Corp.* v. *United States*, 628 F. 2d 1328 (CCPA 1980) (peg to world market prices); *Final Determination of Sales at Less Than Fair Value: Frozen Concentrated Orange Juice from Brazil*, 52 FR 8324 (1989) (peg to commodity prices).

Comment 11

Petitioner argues that CEMEX's shipments to the U.S. that were made during the POI pursuant to Contract 2 should be included in the calculation of U.S. price. Petitioner argues that although Contract 2 s a minimum

quantity contract, and CEMEX agrees that all shipments made during the POI in excess of the minimum quantity should be reported, there is no indication when the minimum quantity was met. Therefore, all shipments made during the POI should be included in the calculation of U.S. price.

CEMEX argues that the Department verified CEMEX had supplied its customer with the quantity stipulated in the purchase agreement. Therefore, only shipments made during the POI that exceed the minimum amount stated in Contract 2 should be included in the calculation of U.S. price.

DOC Position

Where a minimum quantity contract is involved, we consider the date when the parties executed (*i.e.* signed) the contract to be the date of sale for those sales made up to the minimum quantity. *See*, Titanium Sponge from Japan: Final Determination of Antidumping Duty Administrative Review and Tentative Determination to Revoke in Part, 54 FR 13,403 (1989). For sales made in excess of the minimum quantity, we consider the date of purchase order or the date of shipment to be the date of sale (*Id.*). The rationale underlying this different treatment is that neither the seller not [sic] the buyer knows at the time of contract formation the actual quantity to be supplied or purchased above the minimum quantity requirement (*Id.*).

In this case, we verified that although there was no evidence that specified the date when the parties had signed the written purchase agreement, which establishes definite price and minimum quantity terms, the parties had begun performance pursuant to this agreement before the POI. We also verified that the parties had adhered to the minimum quantity term contained in this purchase agreement. We consider the price and the minimum quantity terms to have been established before the POI under these

circumstances. As a result, we determine that the date of sale for shipments made up to the minimum quantity specified in the written purchase agreement precedes the POI. Accordingly, we have not included such sales in our calculations. However, we have included in our calculations shipments made in excess of the minimum quantity.

Comment 12

Petitioner argues that all shipments to the U.S. made pursuant to Contracts 3 and 4 should be included in the calculation of U.S. price, even those shipments made after the POI. Petitioner argues that the date of sale for these contracts falls within the POI and, thus, all shipments made pursuant to these contracts should be used in the calculation of U.S. price. Alternatively, petitioner argues that there was never a binding commitment, as shown by the fact that the guaranteed quantities were not adhered to and, thus, the date of sale could be considered to be the date of shipment. In this case, only those shipments made during the POI pursuant to these contracts should be included in the calculation of U.S. price.

CEMEX argues that the date of sale for shipments made pursuant to Contract 3 during the period April 1, 1989—June 30, 1989, fall outside the POI, because the price and quantity terms for such shipments were reached in an oral agreement that occurred before the POI. CEMEX agrees that shipments from July 1 through December 31, 1989, should be included in the calculation of U.S. price, because the date when the price was established for these shipments fell within the POI. CEMEX further argues that the fact that the minimum quantity was not reached is irrelevant, because there was clear intent by the parties to adhere to the minimum quantities.

For Contract 4, CEMEX argues that the price terms were agreed to on a date that precedes the POI. CEMEX also argues that the quantity terms were agreed to during the prior year.

DOC Position

We agree with CEMEX's position regarding Contract 3. We verified that the parties had begun performance pursuant to a letter agreement, dated before the POI, that established definite price and minimum quantity terms. Although it is unclear when the parties signed this letter agreement, we consider the price and minimum quantity terms, as set forth in this agreement, to have been established before the POI, because the parties had begun performance pursuant to this agreement before the POI. Furthermore, that the parties did not adhere to the minimum quantity terms during performance of the contract does not invalidate their intent to establish definite quantity terms as set forth in the letter agreement. As a result, we consider the date of sale for shipments made up to the minimum quantity during the period April 1, 1989 through June 30, 1989, to precede the PIO [sic]. We, therefore, have not included these sales in our calculations.

We disagree with CEMEX's position regarding Contract 4. CEMEX explained at verification that the parties were adhering to the price and quantity terms of a 1988 purchase agreement during the period July 1, 1989 through March 31, 1989. On April 1, 1989, the parties began performance pursuant to a written amendment to the 1988 purchase agreement that establishes new price and quantity terms. Because the parties established definite price and quantity terms pursuant to this amendment during the POI, we consider the date of sale for Contract 4 to fall within the POI. Accordingly, we have included in our calculations all shipments made pursuant to this contract.

Comment 13

Petitioner argues that sales pursuant to CDC Contract 1 should be included in our calculations because the minimum quantity was not met. Petitioner argues that sales made pursuant to CDC's longterm Contract 2 should

be included in the POI because there was no definite price term established by a memorandum dated prior to the POI. CEMEX argues that this memorandum did, in fact, establish a definite price term and, thus, only those shipments above the minimum quantity stated in the contract should be included in the POI.

DOC Position

We agree with CEMEX. We verified that the parties had formally executed Contract 1 before the POI. We have not included sales pursuant to Contract 1 in our calculations because we have determined that the parties established definite price and quantity terms before the POI. Furthermore, that the parties did not adhere to the quantity terms during performance of the contract does not void their intent to establish definite quantity terms at the time of contract formation (*see,* Comment 12).

For Contract 2, we verified that the memorandum dated prior to the POI establishes a definite price term and simply extended a long-term contract executed by the parties well before the POI. As a result, we consider the date of sale for shipments made pursuant to CDC's Contract 2 to precede the POI. Accordingly, we have not included such sales in our calculations.

Comment 14

CEMEX contends that because a contract with one of Tolteca's customers was executed prior to the POI, sales pursuant to this contract should not be considered in the Department's final determination.

DOC Position

We agree with CEMEX. We verified that the parties had established definite price and quantity terms prior to the POI pursuant to this contract. As a result, we have not included in our calculations sales made pursuant to this contract.

Comment 15

Petitioner contends that since Apasco cannot establish the exact date when Contract 1 was executed (*i.e.*, signed), the Department should use best information available to determine the U.S. price for Apasco's shipments after the POI. Apasco argues that its methodology for determining the date of sale is in accordance with the Department's original questionnaire.

DOC Position

We agree with Apasco. Although the purchase agreement for Contract 1 failed to specify the date when the parties had formally executed (*i.e.*, signed) the contract, we verified that the parties had begun performance pursuant to this purchase agreement, which establishes definite price and quantity terms, before the POI. As a result, we consider the date of sale of Contract 1 to precede the POI and have excluded from our calculations shipments made pursuant to that contract.

Comment 16

Petitioner claims that the U.S. price for sales to the United States pursuant to the long term contracts differs from that reflected on the source documents. CEMEX argues that the gross unit prices reported are correct and that petitioner is confused by a line labeled "exfactory price" on the source documents.

DOC Position

We verified that the amounts reported were correct, and thus no changes to the reported U.S. prices were made in our final calculations of fair market value.

Comment 17

Petitioner argues that since there were two VAT rates applicable in Mexico during the POI, the Department

should use the 6 percent rate which was applicable for sales in border zones. Petitioner argues that for overland shipments to the United States, the 6 percent border zone VAT rate should apply because the export sale would have incurred a 6 percent VAT had it been sold in the border zone before crossing the border. CEMEX argues that the 15 percent VAT rate should be used in calculating VAT on export sales since this is the rate used in virtually all areas of Mexico.

DOC Position

The adjustment for VAT is intended to reflect the tax on home market sales. We found that the 15 percent rate applies to almost all of the home market destinations, and the vast majority of CEMEX's home market sales incurred VAT at the 15 percent rate. Therefore, we have determined that the 15 percent rate is the rate which most closely represents the actual VAT experience in the home market.

Comment 18

Petitioner notes that VAT was improperly double counted on CDC's computer tape.

DOC Position

We agree. CEMEX submitted a new computer tape that contains the verified amounts for CDC's VAT. We have used this revised tape for our final determination.

Comment 19

Petitioner claims that Apasco's claim for duty drawback on refractory bricks and grinding balls should be denied, because these products are not inputs in the subject merchandise. Furthermore, petitioner argues that the replacement of the bricks and balls represents a capital expense which cannot be apportioned by a simple formula.

Apasco maintains that ground clinker obviously contains portions of refractory bricks and grinding balls. Apasco also states that the Department has verified that it received duty drawback.

DOC Position

We agree with Apasco. We verified that Mexican import duties paid by Apasco for refractory bricks and grinding balls used in producing cement were rebated by reason of exportation of the subject merchandise. Therefore, we have allowed Apasco's claim for duty drawback.

Comment 20

Petitioner contends that countervailing duty cash deposits paid or reimbursed by Apasco should be deducted from U.S. price. Apasco points out that the Act provides only that U.S. price be increased by the amount of countervailing duties imposed on the merchandise. Therefore, because no duty has been imposed, Apasco argues that actual duties can be only added to U.S. price once the final duty amount is established.

DOD [sic] *Position*

We agree with Apasco. Section 772(d)(1)(D) of the Act authorizes the Department to make an addition to U.S. price for any countervailing duties imposed (i.e., assessed) on the subject merchandise (19 U.S.C. 1677a (d)(1)(D); *Serampore Industries Pvt., Ltd.* v. *United States*, 675 F.Supp. 1354 (1987)). In this case, the subject merchandise will not be subject to the imposition of simultaneous countervailing duties and antidumping duties until the Department completes any future administrative reviews. Therefore, no adjustment to U.S. price is warranted at this time.

In accordance with Article VI.5 of the General Agreement on Tariffs and Trade, however, it is the Depart-

ment's consistent practice to deduct the amount of the export subsidy from the dumping deposit when final countervailing duty and antidumping orders are in effect (see, Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 18992, 19092 (1984) [sic]. Therefore, if the Department publishes an antidumping duty order in this case, the Department will instruct the U.S. Customs Service to reduce the dumping deposit by the countervailing duty deposit attributable to the export subsidy found in the most recent countervailing duty administrative review covering the subject merchandise (see, Final Results of Countervailing Duty Administrative Review: Portland Hydraulic Cement and Cement Clinker from Mexico, 53 FR 18325 (1988)).

Comment 21

Petitioner argues that CEMEX's home market sales to related parties should be included in the calculation of FMV if they are at prices equal to or greater than the prices charged to unrelated customers.

DOC Position

We agree. In accordance with 19 CFR 353.45(a), we have included home market sales to related parties because they were at or above the prices charged to unrelated customers.

Comment 22

Petitioner argues that for CEMEX and Apasco the Department should follow its practice of disallowing discounts and rebates to related home market purchasers. CEMEX argues that if the Department includes sales to related parties in its calculation of FMV, it should also include discounts and rebates to related customers as well.

DOC Position

We agree with CEMEX. In determining whether to use related party transactions in the home market for fair value comparisons we compared the prices to related parties, net of all rebates and discounts, to the prices to unrelated parties, net of all discounts and rebates. For CEMEX, we determined that such net prices to related parties are at, or greater than, the net prices to unrelated parties. Therefore, in our calculations to determine foreign market value for CEMEX, we have likewise deducted all discounts and rebates from the prices to both related and unrelated parties.

For Apasco, we determined that such net prices to related parties are less than the net prices to unrelated parties. Therefore, we have not included sales to related parties in our calculations to determine foreign market value for Apasco.

Comment 23

Petitioner argues that CEMEX's ESP sales must be reduced by the increased amount of discounts and rebates found at verification. CEMEX claims that the discounts and rebates were reported accurately. There was a slight difference between the reported amounts and the company records, but CEMEX claims that the difference was due to quantity adjustments and to discounts and rebates for products not used in the calculation of U.S. price.

DOC Position

We agree [with] CEMEX. The difference found was negligible, and thus we have made no additional adjustments.

Comment 24

Petitioner argues that the Department should not allow any deductions for discounts and rebates for CEMEX's

home market sales where the customers purchase pozzolanic cement as well as Types I and II cement, because CEMEX has not reported sales of pozzolanic cement and has not explained how the discounts and rebates have been allocated. CEMEX claims that the allocation method, which was verified by the Department, was accurate.

DOC Position

We agree with CEMEX. We verified that the allocation method was accurate and, thus, have allowed the claimed adjustment.

Comment 25

Apasco claimed that a commission was paid to a related party on U.S. sales. Petitioner claims that the Department should deduct this commission. Apasco argues that it has established that the commissionaire is related to Apasco and that the commission therefore represents simply an intracorporate transfer.

DOC Position

We verified Apasco's submission regarding corporate structure, including the relationship of the commissionaire. We are not deducting the related party commission from U.S. price, because we consider it to be an intracorporate transfer. Likewise, in none of the sales used to establish FMV did we make an allowance for commissions paid to related parties.

Comment 26

Petitioner argues that the Department should deduct all movement charges from U.S. price, as well as brokerage and handling fees for all U.S. sales by CDC. Petitioner also argues that the Department must recalculate U.S. packing costs for BCW, one of CEMEX's U.S. affiliates, so that such costs represents the packing costs as verified by the Department.

DOC Position

We agree with petitioner and have deducted all movement charges, as well, [sic] as brokerage and handling fees, for all U.S. sales by CDC. We have used the revised packing costs submitted by CEMEX in our calculations, because these packing costs represent the amounts we verified.

Comment 27

Petitioner notes that the law makes no provision for deducting foreign inland freight from FMV and that inland freight on certain home market sales by CEMEX and Apasco was incurred prior to the date of sales. Therefore, petitioner asserts that home market inland freight that appears to be incurred before the date of sale should not be deducted from the FMV.

CEMEX and Apasco argues that, consistent with two court cases (see, *AOC International, Inc., et al. v. United States*, Slip Op. 89-127 (CIT, September 18, 1989) and *Smith-Corona Group, SCM Corp. v. U.S.* 713 F.2d 1568, 1572 (CAFC, 1983)), inland freight charges should be deducted from both U.S. price and FMV because it is the only way to make an "apples-to-apples" comparison.

DOC Position

We agree with CEMEX and Apasco. We have deducted from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an "apples-to-apples" comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV.

Comment 28

Petitioner contends that inland freight charges billed by a related freight company should be allowed only if they represent arms-length transactions. Apasco maintains that the rates charged Apasco by the related freight

company were compared with those of an unrelated supplier and deemed to be at arm's length.

DOC Position

We agree with Apasco. We have verified that the freight price charged Apasco by the related company is at least as much as that charged by unrelated suppliers and, therefore, was at arm's length. As a result, we have used the related party freight charges.

Comment 29

Petitioner claims that, as best information, the Department should recalculate Apasco's claim for insurance to account for the expected rebate of a portion of the premiums paid during the POI. Apasco argues that the Department has verified information concerning insurance and, therefore, need not use best information available.

DOC Position

As noted in the verification report, Apasco was unable to document rebate of insurance premiums. Furthermore, the effect of adjusting for the expected rebate would be negligible. Therefore, we have made no adjustments to Apasco's claim for insurance.

Comment 30

Petitioner maintains that CEMEX's credit expense on ESP sales should be based on the home market interest rate because CEMEX's U.S. subsidiaries did not borrow money in the U.S. Petitioner further argues that since CEMEX had both peso- and dollar-denominated debt, credit expense for purchase price sales should be calculated based on either CEMEX's interest rate for peso-denominated debt or the average of CEMEX's peso and dollar interest rates.

CEMEX argues that the peso interest rate reflects a factor to compensate for inflation in Mexico and that this

factor is irrelevant to the opportunity cost of holding accounts receivable on dollar-denominated sales. Therefore, the dollar interest rate paid by CEMEX should apply to its dollars-denominated sales.

DOC Position

We disagree with petitioner. In order to calculate credit costs, we seek to determine a respondent's actual borrowing experience. Because CEMEX received U.S. dollar-denominated loans during the POI, we used CEMEX's dollar-denominated interest rate to calculate credit costs for CEMEX's purchase price and ESP sales. This position is consistent with our long-standing administrative practice. See, Porcelain-on-Steel-Cooking Ware from Mexico; Final Results of Antidumping Duty Administrative Review 55 FR 21061 (1990).

[*Comment 31*]

For a small number of purchase price sales, CEMEX received partial, rather than full, payment. Petitioner proposes that the Department reduce U.S. price by the highest percentage that the amount received by CEMEX fell short of an invoiced amount. CEMEX states that prior to verification, it notified the Department in writing that these transactions had not been paid and provided the Department with complete and accurate information.

DOC Position

For the transaction where full payment had not been received, we calculated credit expenses using CEMEX's data on the highest average number of days accounts were outstanding for the CEMEX affiliates with purchase price sales. We consider this methodology to be a reasonable representation of credit experience and have used it as best information in our final determination.

Comment 32

Petitioner contends that the basis for calculating U.S. inventory carrying costs should include the total cost for the U.S. affiliate to purchase the cement, in addition to transportation costs incurred to transport the cement to the terminal. Petitioner argues that because CEMEX did not report when the merchandise entered into the inventories of its U.S. affiliates, as best information available, the Department should use the time between the date of production and the date of sale to the first unrelated purchaser to calculate the time that the cement remained in U.S. inventory. Petitioner further claims that since CEMEX's U.S. affiliates do not borrow money in the U.S., and CEMEX has not claimed that it maintains separate accounts for dollar and peso loans, the Department should recalculate CEMEX's inventory carrying costs using the average of CEMEX's peso and dollar interest rates.

CEMEX submits that it has reported the time inventory destined for the U.S. market was held in Mexico and the time it was held in the United States. Finally, CEMEX argues that using a foreign currency denominated rate for the time inventory is owned by a U.S. subsidiary makes sense only when a dollar rate is not available.

DOC Position

We found that CEMEX borrows in both dollars and pesos. Therefore, we have adhered to the Department's standard practice which is explained below to calculate the inventory carrying cost. In this case, for the period between production and entry into the United States, we have used the home market weighted average short term interest rate reported by CEMEX. For the period from entry into the United States until sale to the first unrelated party, we have used the verified U.S. interest rate. Based on CEMEX's corporate organization and record keeping, we consider merchandise to enter the inventory of the U.S. subsidiary when it crosses the U.S. border. We used

the transfer price reported by CEMEX as the basis for the calculation.

Comment 33

We found at verification that Cementos Hidalgo incurs a bank charge on both home market and U.S. sales for checks issued outside the Monterrey metropolitan area, as well as for exchanging dollars to pesos. Petitioner argues that the Department should deduct the unreported bank charge on U.S. sales but not the unreported bank charge on home market sales. Petitioner argues that we should apply the highest bank fee rate verified to all U.S. sales as best information available.

DOC Position

We agree. As best information available, we have applied the highest verified bank fee rate to all U.S. sales and have not deducted the bank fee from the home market sales because Cementos Hidalgo did not report this fee, and we do not know to which sales the fee would apply.

Comment 34

Petitioner argues that the Department should increase the credit expense on all Cementos Hidalgo's U.S. sales because the reported credit days were inaccurate for all the sales examined during verification. As best information available, petitioner suggests that the Department use the longest period of time verified for all sales. Petitioner also argues that Cementos Hidalgo's home market credit expense should be denied because it did not use actual credit days in its calculation.

DOC Position

We agree that the U.S. credit expense should be increased for all U.S. sales. We found at verification that the number of days for which credit was extended was under-

reported on all U.S. sales. Therefore, in our calculations, we used the verified number of credit days for the sales which we verified. As best information available, we used the average credit period of the verified sales for the credit calculation of all other U.S. sales. With regard to the home market credit expense, we disagree with petitioner. Use of an average payment period is acceptable if it is not possible, or if it is too complex, to report actual payment days. We have determined in this case that the use of an average payment period on home market sales is acceptable, because it was too complex to report actual payment days due to the number of home market sales.

Comment 35

Petitioner argues that the Department should disallow Apasco's claimed adjustment for costs incurred as a result of maintaining portable silos at the sites of construction company customers. Petitioner claims that silo maintenance, which constituted all of the claim, was not part of the negotiated price with these customers. Furthermore, petitioner claims that Apasco has not shown that maintenance expenses arose from the use of cement sold during the POI. Apasco maintains that the record verified by the Department clearly establishes the link between the maintenance expenses and the sales during the POI.

DOC Position

We have allowed Apasco's claim for post-sale silo maintenance expenses to home market customers since it is an essential term of the sales. Moreover, based on Apasco's records, we find that it would be unreasonable, if not impossible, to precisely tie its maintenance expenses directly to cement sold in the POI. Therefore, we have accepted Apasco's allocation methodology.

Comment 36

Petitioner argues that Apasco's claim for a circumstance of sale adjustment for technical services should be

disallowed because the technical services are not directly related to sales during the POI. In particular, petitioner cites Apasco's claim that home market technical services were for seminars. Citing the court's ruling in *Rhone Poulenc S.S.* v. *United States,* 592 F. Supp. 1318, 1335 (CIT 1984), petitioner maintains that seminars are generally for promoting good will and future sales and, as such, do not constitute technical services for independent services. Apasco proposes that the Department treat technical services equally in both markets.

DOC Position

We verified that Apasco incurred expenses for seminars which they claimed as a circumstance of sale adjustment for technical services. Since we found no evidence in either market of requests from customers for technical services, and since Apasco was not able to show that the customer visits were made at the request of the customers, we deem the claimed technical service expenses in both markets to have been generally oriented toward promoting good will and future sales, and, as such, are not directly related to the sale of the subject merchandise. Therefore, we are denying Apasco's claimed adjustment for technical services.

Continuation of Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the U.S. Customs Service to continue the suspension of liquidation of all entries of gray portland cement and clinker from Mexico as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after April 12, 1990, the date of publication of the preliminary determination in the Federal Register. The U.S. Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amount by

which the FMV of the subject merchandise from Mexico exceed the U.S. price, as shown below.

Manufacturer/Producer/Exporter	Margin percentage
CEMEX, S.A.	58.38
Apasco, S.A. de C.V.	53.26
Cementos Hidalgo, S.C.L.	3.69
All others	58.05

If the Department publishes an antidumping duty order covering the subject merchandise, the Department will instruct the U.S. Customs Service to reduce the dumping deposit by the amount of the countervailing duty deposit attributable to the export subsidies found in the most recent countervailing duty administrative review covering the subject merchandise. *See, Portland Hydraulic Cement and Cement Clinker from Mexico, supra.* This suspension of liquidation will remain in effect until further notice.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, pursuant to section 735(c)(1) of the Act, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Investigations, Import Administration.

The ITC will determine within 45 days from the date of this final determination whether there is material injury, or the threat thereof, to the domestic industry. If

the ITC determines that material injury, or threat of material injury, does not exist, the proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that material injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on gray portland cement and clinker from Mexico entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, equal to the amount by which the FMV exceeds the U.S. price.

This determination is published pursuant to section 735 (d) of the Act (19 U.S.C. 1673d(d)).

Dated: July 10, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-16693 Filed 7-17-90; 8:45 am]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1239

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee,

CEMEX, S.A.,
Defendant-Appellee,

and

APASCO, S.A. DE C.V.,
Defendant-Appellee.

ORDER

Before MAYER, Circuit Judge, LOURIE, Circuit Judge, and LAY, Senior Judge.

A petition for rehearing having been filed by APPELLEE Cemex, S.A., and responses thereto having been invited by the court and filed by APPELLANT The Ad Hoc Committee and APPELLEE The United States,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue March 8, 1994.

FOR THE COURT

FRANCIS X. GINDHART
Clerk

by /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

Dated: March 1, 1994

[Filed Mar. 1, 1994]

cc: Martin M. McNerney
A. David Lafer
Joseph H. Blatchford
Irvin [sic] P. Altschuler

STATUTES INVOLVED

§ 1677a. United States price

(a) United States price.—For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) Purchase price.

For purposes of this section, the term "purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the mechandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) Exporter's sales price.—For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporters, as adjusted under subsections (d) and (e) of this section.

(d) Adjustments to purchase price and exporter's sales price.—The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been

rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

(e) Additional adjustments to exporter's sales price.—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

§ 1677b. Foreign market value

(a) Determination; fictitious market, sales agencies

For purposes of this subtitle—

(1) In general

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—

(A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other

than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) Use of constructed value

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(3) Indirect sales and offers for sale

If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) Other adjustments

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the commercial quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the commercial quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstances of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(5) Fictitious markets

The occurrence of different movements in the prices at which different forms of any merchandise subject to an antidumping duty order issued under this subtitle are sold (or, in the absence of sales, offered for sale) after the issuance of such order in the principal markets of the foreign country from

which the merchandise is exported may be considered by the administering authority as evidence of the establishment of a fictitious market for the merchandise if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise.

ANTIDUMPING ACT—AMENDMENT

Public Law 85-630; 72 STAT. 583 (1958)

Sec. 2. Subsections (b) and (c) of section 202 of the Antidumping Act, 1921 (19 U.S.C. 161(b) and (c)), are amended to read as follows:

"(b) In determining the foreign market value for the purposes of subsection (a), if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

> "(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),
>
> "(2) other differences in circumstances of sale, or
>
> "(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212(3) is used in determining foreign market value,

then due allowance shall be made therefor.

"(c) In determining the foreign market value for the purposes of subsection (a), if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value, or that the fact that the exporter's

sales price is the same as the foreign market value, is wholly or partly due to—

"(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

"(2) other differences in circumstances of sale, or

"(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212(3) is used in determining foreign market value,

then due allowance shall be made therefor."

Sec. 3. The heading and text of section 205 of the Antidumping Act, 1921 (19 U.S.C. 164), are amended to read as follows:

"FOREIGN MARKET VALUE["]

"Sec. 205. For the purposes of this title, the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation

to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 207, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value."

Antidumping Act of 1921
Ch. 14, 42 Stat. 11 (1921)

SPECIAL DUMPING DUTY.

SEC 202. (a) That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production) there shall be levied, collected, and paid, in addition to the duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) If it is established to the satisfaction of the appraising officers that the amount of such difference between the purchase price and the foreign market value is wholly or partly due to the fact that the wholesale quantities, in which such or similar merchandise is sold or freely offered for sale to all purchasers for exportation to the United States in the ordinary course of trade, are greater than the wholesale quantities in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), then due allowance shall be made therefor in determining the foreign market value for the purposes of this section.

(c) If it is established to the satisfaction of the appraising officers that the amount of such difference between the exporter's sales price and the foreign market value is wholly or partly due to the fact that the wholesale quantities, in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the

United States in the ordinary course of trade, are greater than the wholesale quantities in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), then due allowance shall be made therefor in determining the foreign market value for the purposes of this section.

PURCHASE PRICE.

SEC. 203. That for the purposes of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

EXPORTER'S SALES PRICE.

SEC. 204. That for the purpose of this title the exporter's sales price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the acount of the exporters, plus when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

FOREIGN MARKET VALUE.

SEC. 205. That for the purposes of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the

United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

Hearings Before the Committee on Ways and Means, U.S. House of Representatives, on H.R. 6006, 6007 and 5120, July 30, 1957.

Report Of the Secretary Of the Treasury To the Congress On the Operation and Effectiveness Of Antidumping Act and On Amendments To the Act Considered Desirable Or Necessary.

PART I. OPERATION

The Antidumping Act—A Technical Explanation

The Antidumping Act was originally enacted as sections 201-212, 406, 407, law of May 27, 1921 (42 Stat. 11-15, 18). It has been substantially amended once by the Customs Simplification Act of 1954 (68 Stat. 1138-1139). It is published in title 19, United States Code, sections 160-173 (1952 edition, secs. 161(b)-173; supplement III to 1952 edition, sec. 160-161 (a)).

The Antidumping Act employs certain terms which have highly specialized meanings. These terms are referred to in the body of this summary in quotation marks, and a glossary is given at the conclusion in annex A.

Finding of Dumping Under the Antidumping Act

The Antidumping Act provides that a "finding" shall be made when it has been established that:

(*a*) Foreign merchandise is, or is likely to be, sold to the United States market at a price less than "fair value," and

(*b*) An American industry is, or is likely to be, injured, or is prevented from being established, because of importation of such merchandise to the United States.

The Treasury Department determines whether there are sales at less than "fair value." If the Treasury's investigation shows that there have been sales at less than "fair value" then, and not until then, the case is referred to the United States Tariff Commission which decides the question of injury. If the Tariff Commission determines

that there is injury, a finding is announced and dumping duties are thereupon assessed.

Calculation of Sales at Less Than "Fair Value"

It has been pointed out that the first step in making a finding under the Antidumping Act is determination by the Treasury of sales of foreign merchandise to the United States at less than "fair value."

Definition of "fair value"

The term "fair value" is not defined in the act. It is defined in Customs Regulations, section 14.7 (19 C.F.R. 14.7). This definition ordinarily bases "fair value" simply on sales for home consumption in the producer's country, but bases it on sales otherwise than for exportation to the United States, i.e., sales for home consumption and to third countries, where the quantity of home consumption sales is so small as to furnish an inadequate basis for comparison. In addition, the regulations provide for calculating any one foreign producer's "fair value" by reference to prices charged by other foreign producers for similar merchandise when access to that foreign producer's records is not feasible, or where the information obtained from that foreign producer is insufficient or inadequate. If adequate information is not available as to home consumption or third country prices, "fair value" is based on cost of production.[1] In the discussion that follows it will ordinarily be assumed for purposes of simplification, that there is a sufficient volume of home consumption sales to use them as the basis for "fair value."

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[1] Accounting methods among countries and among companies within any given country vary widely, and it is almost universally agreed that prices actually charged or offered are a far better measure of value than any attempt to calculate material costs, labor, overhead, and profit for any given product. Accordingly it can be said that calculation of "cost of production" as a method for computing the basis for dumping price is generally warranted only as a last resort.

Comparison between "fair value" and price to the United States market

In considering whether there have been sales at less than "fair value," the price at which sales have been made to the United States market is compared with the figure thus calculated to be the "fair value." In making the comparison, it is necessary to reduce the two prices to comparable terms. In its simplest form the calculation can ordinarily be made by taking the f.o.b. factory price, in each case for the sale to the United States market and for the home consumption sale. A typical price comparison could be worked out as follows, assuming the United States importer to be in Pittsburgh, Pa., United States.

Home consumption price in country of export:		
Price, delivered to purchaser		$1.10
Less: Transportation from factory to purchaser		.05
Price f.o.b. factory		1.05
Price to the United States market:		
Price, delivered Pittsburgh		1.10
Less:		
Transportation from factory to export port	$0.05	
Ocean transportation	.15	
Transportation, United States port to Pittsburgh	.05	
United States import duties	.10	.35
		.75
Computation:		
Home consumption price		1.05
Price to United States		.75
Difference		.30

Facts such as these typically present a case for determination of sales at less than "fair value."

General Accounting Office Report to Congress
Administration of the
U.S. Antidumping Act of 1921

March 15, 1979

Circumstances of sale

Fair value comparisons are further complicated by disagreements over the identification and treatment of allowances arising from differences in commercial practices. Representatives of various industries in Europe, Canada, Japan, and Australia complained that U.S. legislation and regulations did not consider modern international business practices. In particular, controversy has developed over two aspects of Treasury regulations, which provide that:

—"differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration; and,

—"in making comparisons using exporter's sales price, reasonable allowance will be made for actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States."

The representatives said that these regulations do not adequately consider possible cost differences between the domestic and foreign markets for advertising, distribution, and other selling and marketing expenses. The provision that cost be directly related to the sale under consideration does not make allowances for such things as salaries and expenses of sales staff, maintenance of distribution centers, most advertising costs, etc.; thus, the foreign market value is overstated. This is particularly controversial because an unrelated importer will usually purchase merchandise at the factory price plus factory profit and per-

haps free-on-board costs, as illustrated by assumed costs and prices in the the example below.

Ex-factory cost	$100
Profit	5
Foreign inland freight	2
	107
Ocean freight duties	5
Total landed price	$112

Consider that the foreign producer, in marketing a product in the home market, incurs:

Ex-factory cost	$100
Profit	5
Foreign inland freight	2
	a/107
Sales staff	1
Commissions	1
Advertising	3
Distribution	2
Final sales price	$114

a/Producer's sales price and importer's purchase price.

The home market value is established by deducting from the $114 only those costs directly related to the sale, in this case, the $1 in direct sales commissions, which leaves a relatively high home market value of $113. The importer's total landed price is reduced to allow for transportation and duties. Treasury then compares the home market "fair value" price with the importer's purchase price, as illustrated below:

	Home market (Producer)	Export market (Importer)
Final sales price	$114	$112
Less commissions	–1	
Less:	113	112
Foreign inland freight	–2	–2
Ocean freight/duties		–5
Prices for comparison	$111	$105

When calculations are made on the basis of the exporter's sales price (related importer), allowances for selling costs are made only up to the dollar value of the selling costs for the same products in the U.S. market. The exporter's sales price is defined by Treasury as the factory price plus or minus profits or losses for both the factory and the U.S. affiliate plus transportation costs, as shown below.

	Home market (Producer)	Export market (Importer)
Ex-factory cost	$100	$100
Factory Profit	2	2
Affiliate Profit		2
	$102	$104
Transportation	1	1
Duties		5
Selling expense	10	3
Final sales price	$113	$113

Based on these assumptions, the home market price and the export market price (to the first unrelated buyer) is the same—$113.

To determine the costs of marketing the product, Treasury reduces the exporter's sales price for expenses incurred by the importer in selling to an unrelated purchaser; the home market price is also reduced up to the same dollar value. Assuming that both the producer and

the importer incur marketing costs of $10 and $3, respectively, the following calculations are made.

	Home market (Producer)	Export market (Importer)
Final sales price	$113	$113
Selling expenses	–3	–3
Transportation	–1	–1
Duties		–5
Total deductions	–4	–9
Prices for comparison	$109	$104

If the producer's full marketing costs of $10 were allowed, the home market value would be $102 and no dumping margin would be indicated. To the extent that prices in the home (or third country) market are higher by virtue of higher fixed expenses, there will be better opportunity for finding dumping margins. Foreign business interests complain that fair value calculations made in this manner do not recognize that costs of doing business can be higher in foreign countries than in the United States.

Customs officials told us that expenses for marketing, advertising, etc., incurred for a particular sale are generally allowable adjustments to the home or third-market price; expenses incurred prior to the sale or which would have been incurred whether or not the sale was made are not allowed. The officials explained that basically they look at the function or service performed in determining allowable adjustments. Potentially allowable adjustments include guarantees, provision of technical assistance and servicing, and differences in credit terms and commissions. Adjustments which are routinely disallowed include rents, utilities, office supplies, salaries and wages, and fringe benefits. The line between allowed and disallowed adjustments, then, is drawn roughly between fixed and variable costs to a producers [sic]. (See app. III.)

Adjustments for circumstances of sale are quantified on the basis of the cost to the seller. Although Customs regulations provide that, where appropriate, the effect of these differences on the market value of the merchandise will be considered, officials explained that this is rarely practical because all merchandise is uniformly affected by circumstance of sale and it normally is not possible to isolate the effects on market value of each of these items.

Customs regulations permit the calculation of margins on a weighted-average basis, which amounts to determining a weighted-average home market value and comparing it with individual sales to the export market. This method of determining margins between home and export market sales tends to enlarge existing margins or to create margins where none existed. However, in determining margins for duty assessment, officials are required to compare import sales values on an entry-by-entry basis to individuals home market values at the time of purchase or export rather than on weighted averages.

RULE 29.1 STATEMENT
CEMEX SUBSIDIARIES

MEXICO:

Agricola Prima, S.C.; Anahuac Administracion, S.C.; Anahuac Empresa Inmobiliaria, S.A.; Arcilla, Calia y Yeso Anahuac S.A.; Arenera del Oriente, S.A. de C.V.; Arrendadora de Maquinaria, Equipo y Inmuebles, S.A. de C.V.; Cal Guadalajara, S.A. de C.V.; Cecord Inc.; Cegusa, S.A.; Cemento Portland Nacional, S.A. de C.V.; Cementos Anahuac, S.A. de C.V.; Cementos Anahuac del Atlantico, S.A. de C.V.; Cementos Anahuac del Pacifico, S.A.; Cementos Atoyac, S.A. de C.V.; Cementos de Oritente, S.A. de C.V.; Cementos del Pacifico S.A. de C.V.; Cementos del Valle, S.A. de C.V.; Cementos del Yaqui, S.A. de C.V.; Cementos Guadalajara, S.A. de C.V.; Cementos Maya, S.A.; Cementos Sinaloa, S.A. de C.V.; Cementos Tolteca, S.A. de C.V.; Cia. de Transportes del Mar de Cortes, S.A. de C.V.; Comercializadora Cemex del Pacifico, S.A. de C.V.; Compania Minera Atoyac, S.A. de C.V.; Concreto Premezclado Nacional, S.A. de C.V.; Concretos y Precolados, S.A. de C.V.; Conceretos de Alta Calidad y Agregados, S.A. de C.V.; Concretos del Bajio, S.A.; Concretos Guadalajara, S.A. de C.V.; Concretos Procesados, S.A.; Concretos Tamaulipas, S.A.; Concretos y Agregados de California, S.A. de C.V.; Distribuidora Mexicana de Materiales, S.A.; Empresas Tolteca de Mexico, S.A. de C.V.; Empresas Turisticas Cemex/Marriott, S.A. de C.V.; Explotadora de Canteras, S.A. de C.V.; Fomento de Cultura Obrera de Tlanepantla, A.C.; Fomento Industrial, S.A. de C.V.; Granos y Terrenos, S.A. de C.V.; Grupo Anahuac, S.A. de C.V.; Grupo Tolteca, S.A. de C.V.; Inmobiliaria Angeles Segovia, S.A.; Inmobiliaria Industrial Mazatleca, S.A. de C.V.; Inmobiliaria Z.P. Triangular, S.A. de C.V.; Instalaciones y Bodegas Portuaria y Terrestres Anahuac, S.A.; Mano de Obra Industrial y Tecnica, S.A. de C.V.; Maquiladora y Distribuidora de Materiales para la Construccion, S.A. de C.V.; Materiales Valladolid, S.A. de

C.V.; Materias Primas Anahuac del Golfo, S.A.; Organizacion Operadora de Constructoras Lomex del Norte, S.A. de C.V.; Polimero Cemex, S.A. de C.V.; Polycemex, S.A. de C.V.; Preconcreto, S.A. de C.V.; Proambiente, S.A. de C.V.; Productora de Extruidos, S.A.; Productos Calcarios, S.A. de C.V.; Proveedora Mexicana de Materiales, S.A. de C.V.; Servicios Automecanicos, S.A. de C.V.; Simifa, S.A. de C.V.; Tolmex, S.A. de C.V.

SPAIN:

Aerocemex; Aridos Clasificados de Fuerteventua, S.A.; Aridos Formigons, S.A.; Aritong, S.A.; Balear de Hormigones, S.A.; Cantera Vimer, S.A.; Canteras Ibericas, S.A.; Cementos Ceuta, S.A.; Cementos de las Islas, S.A.; Cementos de Mallorca, S.A.; Cementos del Atlantico, S.A.; Cementos del Mar, S.A.; Cementos del Sureste; Cementos Especiales, S.A.; Cementos La Palma, S.A.; Cementos Peyland, S.A.; Cementos Portland Morata de Jalon, S.A.; Cenizas Volantes de Cataluna y Aragon, S.A.; Comercial Aridos Canarios, S.L.; Compania Internacional de Cementos, S.A.; Compania Valenciana de Cementos Portland, S.A.; Depositos y Mallorca, S.A.; Hormigones de Toledo, S.A.; Hormigones del Este, S.A.; Hormigones Fumet, S.A.; Hormigones Ibiza, S.A.; Hormigones La Costera, S.A.; Hormigones Mecanizados, S.A.; Hormigones Menorca, S.A.; Hormigones Palma, S.A.; Hormigones Servol, S.A.; Hormigones Torrevieja, S.A.; Hormigones Varela de Andalucia, S.A.; Hormigones y Cenizas Andalucia, S.A.; Hormigones y Fabricados, S.A.; Hormisol Canarias, S.A.; HRC, S.A.; Intral, S.A.; K.M.K.; La Auxiliar de la Construccion, S.A.; Macrel, S.A.; Magatzem Cos Nou, S.L.; Materiales Hidraulicos Griffi, S.A.; Mediterranea de Hormigones; Morteros de Mediterraneo, S.A.; Morteros Ibericos, S.A.; Morteros y Cementos de Baleares, S.A.; Morteros y Hormigones del Tajo, S.A.; Portcement, S.A.; Portland Albacete, S.A.; Portland Iberia, S.A.; Prebesec Aragon, S.A.; Prebesec Ibiza, S.A.; Prebesec Valencia, S.A.; Prebetong Aragon,

S.A.; Prebetong Canarias, S.A.; Prebetong del Este, S.A.; Prebetong Extremadura, S.A.; Prebetong Madrid, S.A.; Prebetong Menorca, S.A.; Prebetong Noreste (Morteros de Andalucia, S.A.); Prebetong Oeste, S.A.; Prebetong Sureste, S.A.; Prebetong Valencia, S.A.; Prefabricados Ciudadela, S.A.; Prohosa-2, S.L.; S.A. Inmobiliaria Valenciana; Sahor Hormisol, S.A.; Sevilla 2000, S.A.; Silos de Pasajes; Suco, S.A.; Tecnicas de Anclajes, S.A.; Toledana de Bombeos, S.A.; Transporte y Bombeo de Hormigon, S.A.; Transportes Biniamar, S.A.; Transportes Colas, S.A.; Transportes de Cementos, S.A.; Transportes del Sureste, S.A.; Valencia Export S.L.; Valmix, S.L.; Ytong Barcelona, S.A.

VENEZUELA:

Agregados para Mezclas Aremix, C.A.; Agropecuaria Rosarito, C.A.; Banneret Limited; Bay Rock, Inc., C.A.; Vencemos Lara, C.A.; Vencemos Mara, C.A.; Vencemos Pertigalete, C.A.; Venezolana de Griferia, C.A.; Vzolana. de Acc. Industriales; Caja de Ahorro Vencemos; Canteras de Oriente, C.A.; Cementos Guayana, S.A.; Clipper; Com. de Cementos Catia La Mar, C.A.; Comercializadora Seles, C.A.; Comercializadora Vencemos (COMVENCEMOS), C.A.; Conomita, S.A.; Corporacion Autana, C.A.; Corporacion Financiera Vencemos, S.A.; Corporacion Metalmen, C.A.; Corporacion Venezolana de Cementos, S.A.C.A.; Dist. de Cementos Porlamar, C.A.; Edesa; Emprendedora Shipping Co.; Espartana Shipping Co.; Finca Vencemos, C.A.; Fundicion de Aceros Mara, C.A.; Independiente Shipping Co.; Inmobiliaria 2022, C.A.; Inmobiliaria 220, C.A.; Inmobiliaria Caseban, S.A.; Inmobiliaria Coloca, C.A.; Inmobiliaria Valle Dos C.A.; Inmuebles Dirosal, S.A.; Inversiones 8136, C.A.; Inversiones Bripar, C.A.; Inversiones Cemento, C.A.; Inversiones Lyser, C.A.; Inversiones Pamatacualito, C.A.; Inversiones Rathenau, C.A.; Inversiones Vencemos, C.A.; Lafarge Coppee; Laveda Company Limited; Lema Holding; Leona Shipping Co.; LL Trading Company Limited;

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CAYMAN ISLANDS:

Anmar Inc.; Caribe Enterprises; Cecar, Inc.; Cetra, Inc.; Serkatia; Sunbulk Shipping Inc.

UNITED STATES OF AMERICA:

Cemago Investments Inc.; Cementos del Mar Inc.; Florida Sun Cement Co. Inc.; Gray Stone of Kentucky, Inc.; Interamerican Investments, Inc.; Norval, Inc.; Orlandomex, Inc.; Red Rock of Minnesota, Inc.

PANAMA:

Ceser, S.A.; Dixon Corporation; Maritima del Golfo, S.A.; Operadora Cementera Maritima, S.A.

REPUBLICA DOMINICANA:

Hispano Dominicana de Cemento Blanco, S.A.; Hotelera del Atlantico, S.A.

OTHERS:

Cardington Ltd. (Bermuda); Ciments Blanc du Maroc, S.A. (Morocco); Desa Portugal (Portugal); Maya-Belize Cement Limited (Belize); Sandworth Plaza Holding B.V. (Netherlands); South East Enterprises, Inc. (British Virgin Islands)

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No. 93-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CEMEX, S.A.,
Petitioner,
v.
UNITED STATES OF AMERICA,
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
and APASCO, S.A. de C.V.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

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QUESTION PRESENTED

Whether the antidumping statute authorizes the deduction of pre-sale home market transportation costs from foreign market value in the calculation of an antidumping margin.

PARTIES TO THE PROCEEDING

Respondent, The Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement, makes the following amendment to the listing of corporate affiliations included in Petitioner's statement pursuant to Rule 29.1 of this Court. The Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement is an informal association composed of U.S. producers of gray portland cement and cement clinker. The members of the Ad Hoc Committee and their parent companies and non-wholly owned subsidiaries, if any, are listed below:

Florida Crushed Stone Co.

Holnam, Inc. (subsidiary of Holderbank Financiere Glaris Ltd.)

Holnam Texas, L.P. (formerly BoxCrow, Inc.) (majority owned by Holnam, Inc.)

North Texas Cement Co. (joint venture of Hanson PLC and Pioneer International)

Phoenix Cement Co.

Riverside Cement Co. (joint venture of Hanson PLC and Ssangyong Cement Co.)

Southdown, Inc.

Texas Industries, Inc.

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BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

STATEMENT

1. In its final determination in the antidumping investigation underlying this case, the Department of Commerce, International Trade Administration ("Commerce"), deducted from foreign market value ("FMV") the Mexican respondents' expenses incurred in transporting their products from plants to distribution warehouses prior to sale to customers in Mexico. Commerce cited no provision of the antidumping statute permitting this deduction. Instead, Commerce merely stated that it "deducted

from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an 'apples-to-apples' comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV." Pet. App. 55a.

Commerce's deduction of transportation costs from U.S. price was required by 19 U.S.C. § 1677a(d)(2)(A), which mandates that the U.S. price "shall be adjusted by" subtracting "the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States . . . ." As conceded by all parties below, however, there is no comparable provision of the antidumping statute providing for the deduction of transportation costs from FMV.

In addition, as the government conceded below and the Federal Circuit found, Pet. App. 4a-5a, Commerce's deduction from FMV of pre-sale home market transportation expenses in the investigation below represented a change in its longstanding practice. Previously, Commerce analyzed home market transportation expenses under the provision of the antidumping statute allowing adjustments for "other differences in circumstances of sale," 19 U.S.C. § 1677b(a)(4)(B). Whether an expense is properly deductible as a circumstance of sale adjustment depends upon whether the expense is directly related to the sale at issue. 19 C.F.R. § 353.56(a)(1). Prior to the investigation below, Commerce did not treat pre-sale costs for transporting merchandise from the plant to a distribution warehouse as direct expenses deductible under the circumstance of sale provision. Those expenses were considered not directly related to a sale because no sale had yet occurred. Instead, such expenses were treated as indirect selling expenses that did not satisfy the criteria

for a circumstance of sale adjustment to FMV.[1] *See, e.g., Color Television Receivers From The Republic Of Korea,* 55 Fed. Reg. 26,225 (1990); *Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From The Federal Republic Of Germany,* 54 Fed. Reg. 19,049 (1989); *Television Receivers, Monochrome And Color, From Japan,* 53 Fed. Reg. 4052 (1988); *Portable Electric Typewriters From Japan,* 52 Fed. Reg. 1504 (1987).[2] In November 1985, in fact, Commerce advised Congress that the antidumping statute gave it no general authority to deduct pre-sale home market transportation costs from FMV.[3]

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[1] Indirect selling expenses are deductible to a limited extent, depending upon whether the fair value comparison is with purchase price or exporter's sales price ("ESP") sales. United States price is normally based on purchase price when the U.S. importer is not related to the foreign manufacturer or exporter. United States price is based on ESP when the U.S. importer is related to the foreign manufacturer or exporter. Indirect selling expenses for U.S. sales are deducted from U.S. price only in ESP comparisons, not in purchase price comparisons. Home market indirect selling expenses are deducted from FMV only when U.S. price is based on ESP, and the deduction is capped at the level of indirect selling expenses deducted from U.S. price.

[2] Petitioner erroneously asserts, Pet. 8 n.11, that this practice ended in 1987, rather than with Commerce's 1990 final determination in this case, as the government acknowledged in the courts below and as the Federal Circuit found. CEMEX's only explanation for its allegation that the practice ended three years earlier is its citation, Pet. 14-15 n.17 and 19 n.21, of the Department's 1987 decision in *Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,440, 25,441-42 (1987), in which the Department, contrary to its otherwise consistent practice, deducted pre-sale home market transportation costs from FMV as a direct expense. Commerce's aberrant departure from its practice on one occasion in 1987 did not signal an end to the practice. In a number of cases subsequent to 1987, including cases cited above, Commerce continued to treat pre-sale home market transportation costs as indirect expenses.

[3] In November 1985, Commerce prepared for Congress a detailed report entitled "Antidumping Adjustments Methodology And

2. Before the Court of International Trade, the government asserted no statutory basis for Commerce's deduction of pre-sale home market transportation costs. Instead, the government claimed that, because the statute did not expressly address the proper treatment of those costs, Commerce had inherent authority to fill the "gap" in the statute by making any adjustment that would result in a fair comparison between FMV and U.S. price. The Court of International Trade upheld Commerce's change in practice as a proper exercise of Commerce's authority under the antidumping law. Pet. App. 17a-21a.

3. The Federal Circuit reversed and remanded. Pet. App. 1a-12a. It noted the parties' agreement "that although the Act requires Commerce to deduct transportation costs from USP [U.S. price], there is no specific statutory authorization for Commerce to deduct home-market transportation expenses from its calculations of FMV." Pet. App. 4a. The court rejected the argument that Commerce's change in practice was justified as an exercise of "its inherent power as the administering authority to fill 'gaps' in the statutory framework." Pet. App. 5a-6a. The Federal Circuit reasoned that the statute was not silent on the issue of pre-sale home market transportation costs and, therefore, left no "gap" for Commerce to fill. "It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission." Pet. App. 6a, citing, *inter alia, Russello*

Recommendations For Statutory Change." That report was required by section 624 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2248, which directed Commerce to "undertake a study of the current practices that are applied in making adjustments to FMV and U.S. price in antidumping cases." The relevant portion of this study is included in the appendix to this brief at 1a.

v. United States, 464 U.S. 16, 23 (1983). "[H]ad Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. . . . That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV." Pet. App. 7a-8a.[4]

The Federal Circuit also observed that the antidumping statute has undergone numerous amendments, including significant amendments in 1984 and 1988, with no change in the statutory language regarding deduction of transportation costs. Pet. App. 9a. The court further noted Commerce's statement in the 1985 Antidumping Adjustments Methodology study that it lacked statutory authority to deduct pre-sale home market transportation costs from FMV. "That Congress knew of the agency's prior interpretation of the Act and, despite twice amending other Act provisions, did nothing to change the interpretation or the statutory language on which it was based is persuasive evidence that the agency's prior interpretation was the one intended by Congress." *Id.*

The Federal Circuit rejected the argument that Commerce's change in practice should be upheld because it resulted in an "apples to apples" comparison between FMV and U.S. price. Citing *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984), the court stated that

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[4] This conclusion was bolstered by the language of the 1921 Antidumping Act, the predecessor to the current law. The FMV and U.S. price provisions of the 1921 Act were not merely parallel, but nearly identical, the exception being the failure of the FMV provision to provide for deduction of transportation expenses. Pet. App. 8a n.9. "Even given the vagaries of the legislative drafting process, it is impossible to imagine that Congress unintentionally included the same phrasing in the two passages only up to the point where the deduction for transportation costs from USP was discussed." *Id.* Consequently, "[t]he omission of the transportation cost deduction from FMV seems fully intended." *Id.*

"courts do not consider the reasonableness of an agency's interpretation of a statute unless the relevant statute is silent or ambiguous on the question at hand." Pet. App. 10a. Because the statute itself answered the question whether pre-sale home market transportation costs should be deducted from FMV, the reasonableness of Commerce's interpretation was irrelevant. *Id.* The Federal Circuit also stated that, even if the achievement of a fair comparison between U.S. price and FMV were a goal of the antidumping statute, "it is not this court's role to substitute its view of the statute's purpose for the plain language, or conspicuous lack thereof, in the statute." Pet. App. 11a.

Accordingly, the Federal Circuit reversed and remanded with directions that Commerce recalculate the dumping margins without deducting pre-sale home market transportation costs. Pet. App. 12a.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

The decision below does not conflict with the decision of another court of appeals on the question presented in the petition. Indeed, such a conflict cannot arise, because the narrow issue of statutory interpretation in this case is within the exclusive jurisdiction of the Federal Circuit. The Court of International Trade has exclusive jurisdiction over civil actions commenced under 19 U.S.C. § 1516a(a)(2) to review final determinations by Commerce in antidumping investigations, 28 U.S.C. § 1581(c), and the Federal Circuit has exclusive jurisdiction to review judgments of the Court of International Trade, 28 U.S.C. § 1295(a)(5). In establishing the Court of International Trade and the Federal Circuit in 1980, Congress intended to "create[] a comprehensive system of judicial review of civil actions arising from import

transactions, utilizing the specialized expertise" of the two courts. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980). Congress thus envisioned that the Federal Circuit would have the final word over most (if not all) issues arising under the U.S. trade laws.

Petitioner suggests that the decision below conflicts with the "approach" to interpretation of the antidumping statute applied by the Federal Circuit in *Smith-Corona Group v. United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). In *Smith-Corona,* the Federal Circuit stated that, where the antidumping statute is silent on an issue, Commerce generally has the authority to resolve that issue in a manner that results in a fair comparison between FMV and U.S. price. An alleged intra-circuit conflict, however, is for the court of appeals, not this Court, to resolve. *See Wisniewski v. United States,* 353 U.S. 901, 902 (1957).[5]

In any event, there is no such conflict. The issue in *Smith-Corona*—whether Commerce's regulation providing for the deduction of indirect selling expenses from FMV in exporter's sales price comparisons up to the amount deducted from U.S. price was in accordance with the antidumping statute—is not the issue decided by the Federal Circuit in this case. Moreover, even if the Federal Circuit used different "approaches" in deciding the two cases, it fully explained the rationale for that difference in this case: "The general prescriptions of *Smith-Corona,* which serve to guide Commerce in making reasonable interpretations of the Antidumping Act, do not apply where the Act itself clearly expresses the intent of Congress." Pet.

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[5] Petitioner did not seek rehearing or rehearing in banc in the Federal Circuit on the basis of the alleged intra-circuit conflict. Petitioner did file a petition for rehearing, but solely on the ground that the case had become moot. Both the government and the Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement argued that the case was still live. The Federal Circuit denied the rehearing petition without comment, and petitioner does not reassert its mootness claim in the petition.

App. 10a. Because "the antidumping statute is not silent on the question of pre-sale transportation cost deductions from FMV," Commerce had no discretion to interpret the statute other than according to its plain language. *Id.* *See, e.g., City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 (1994).

II. THE DECISION BELOW CORRECTLY INTERPRETS THE ANTIDUMPING STATUTE AS NOT PERMITTING THE DEDUCTION OF PRE-SALE HOME MARKET TRANSPORTATION COSTS FROM FOREIGN MARKET VALUE

The Federal Circuit's interpretation of 19 U.S.C. § 1677b is based on familiar principles of statutory construction, which demonstrate that Congress did not give Commerce authority to deduct pre-sale home market transportation expenses. Thus, the petition does not raise an important question of federal law that requires resolution by this Court.

Generally, Commerce calculates dumping margins by comparing the FMV of the merchandise to the U.S. price. FMV and U.S. price are determined by making various adjustments, set out in the statute, to the gross selling price to the customer in the foreign market and in the United States. 19 U.S.C. §§ 1677a & 1677b. There is no dispute that the statute requires Commerce to deduct from U.S. price all costs of transporting the merchandise from the foreign plant to the U.S. destination. *See* 19 U.S.C. § 1677a(d)(2)(A). There is also no dispute that the statute does not similarly provide for the deduction of transportation costs from FMV. *See* 19 U.S.C. § 1677b(a).

Given the explicit requirement that Commerce deduct transportation costs in calculating U.S. price and the lack of authorization to make a corresponding deduction from FMV, the Federal Circuit reasonably concluded that Congress did not intend transportation costs to be treated the

same in calculating U.S. price and FMV. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello*, 464 U.S. at 23 (citation omitted). *Accord Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1967 (1994); *Rodriguez v. United States*, 480 U.S. 552, 525 (1987). If Congress had intended to authorize Commerce to adjust FMV for home market transportation costs in all instances, as petitioner claims, it would surely have done so expressly, as it did in the corresponding section governing the calculation of U.S. price. *See Russello*, 464 U.S. at 23 (citation omitted).[6]

Petitioner insists that the court below failed to give proper deference to the interpretation of the statute by Commerce, the agency charged with its administration. Pet. 22-23. At the same time, petitioner concedes—correctly—that the court's obligation to defer to an agency's construction of a statute applies only if there is no "clear direction in the statute" or if there are "textual ambiguities." *Id.* at 22. As this Court stated in *Chevron*, 467 U.S. at 843 n.9, if the reviewing "court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at is-

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[6] Contrary to petitioner's assertion, the holding below that Congress intended different treatment of transportation costs under the FMV and U.S. price provisions of the statute was not a "reflexive application" of the foregoing principle of statutory construction. In addition to the plain language of the statute, the Federal Circuit considered the consistent language of the 1921 Act, Pet. App. 8a n.9, as well as Congress' failure over many years to amend the statute to change Commerce's practice with respect to home market transportation costs. *Id. See, e.g., NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974). The lack of Congressional action was especially significant because Commerce informed Congress in the 1985 Antidumping Adjustments Methodology study that it did not have authority to deduct pre-sale transportation costs from FMV. Pet. App. 9a n.9.

sue, that intention is the law and must be given effect." *Accord. e.g., City of Chicago v. Environmental Defense Fund,* 114 S. Ct. at 1594. Here, the court below correctly ruled that the statute left no interpretational "gap" for Commerce to fill.

Petitioner also erroneously asserts that the Federal Circuit's interpretation of the FMV provision "directly contravenes the fundamental purpose of the antidumping statute." Pet. 10. Even if there were some inconsistency between the general purpose of the antidumping statute and the Federal Circuit's interpretation of the specific provision in dispute, any such inconsistency, as the Federal Circuit correctly concluded, is irrelevant. Pet. App. 10a. As this Court explained in *Rodriguez*:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

480 U.S. at 525-26 (emphasis in original).

Moreover, there is no conflict between the purpose of the antidumping law and the ruling below. Petitioner claims that the "fundamental purpose" of the antidumping law is "to ensure that the amount of the antidumping duty does not exceed the actual margin of dumping" by requiring the comparison between U.S. price and FMV to be at the same point in the chain of commerce in all instances. Pet. 12. None of the authorities cited by petitioner, Pet. 11-12, however, supports this asserted purpose.[7] Rather, the purpose of the law, as repeatedly stated

[7] The legislative history and judicial decisions cited by petitioner, Pet. 11, merely stand for the proposition that the antidumping law is a remedial statute that aims at equalizing competitive conditions between foreign exporters and U.S. producers. None of those authorities suggests—let alone holds—that the antidump-

by Congress and the courts, is to remedy and deter the dumping of foreign merchandise in the United States.[8] The Federal Circuit's decision is not inconsistent with this purpose.

Finally, there is no substance to petitioner's hyperbolic argument that the Federal Circuit's interpretation of 19 U.S.C. § 1677b does "violence . . . to the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT)" and has "ramifications for the foreign policy and international economic relations of the United States." Pet. 2 and 24. Petitioner nowhere explains what "foreign policy and international economic relations" are implicated by the decision below. Rather, petitioner merely argues that Commerce's deduction from FMV of pre-sale home market transportation costs was consistent with Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 26th Supp. BISD 171 (1980) ("Antidumping Code") and should have been upheld by the Federal Circuit. There are at least two problems with this argument.

First, petitioner did not raise this argument in the courts below, and those courts did not address it. Petitioner

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ing law requires identical adjustments to FMV and U.S. price in all instances, much less that such a requirement is a "fundamental purpose" of the law.

[8] *See* H.R. Rep. No. 1, 67th Cong., 1st Sess. 1 (1921) (purpose of Antidumping Act is "to prevent dumping of foreign merchandise on the markets of the United States"); S. Rep. No. 16, 67th Cong., 1st Sess. 1 (1921) (same); H.R. Rep. No. 79, 67th Cong., 1st Sess. 1 (1921) (same); S. Rep. No. 1298, 93d Cong., 2d Sess. 179 (1974) ("The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry."); *Melamine Chem., Inc. v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984) ("The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at [less than fair value] by the imposition of appropriately increased duties.").

may not raise an argument in this Court for the first time. *See, e.g., United States v. Williams*, 112 S. Ct. 1735, 1738-39 (1992).

Second, even if the Federal Circuit's interpretation of the statute were inconsistent with the Antidumping Code, that provides no reason to question that interpretation. As noted by petitioner, Pet. 12-13, Congress passed the Trade Agreements Act of 1979 to implement the provisions of the Tokyo Round GATT Agreement, including the provisions of the Antidumping Code. *See* 19 U.S.C. §§ 2502 & 2503 (Congressional statement of purpose in enacting Trade Agreements Act and provision approving Tokyo Round trade agreements); S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979) (1979 Act was "drafted with the intent to permit U.S. practice to be consistent with the obligations of the agreements, as the United States understands those obligations"). Thus, Congress understood and intended the revised antidumping law enacted in 1979 to carry out the obligations of the United States under the Antidumping Code. Consequently, Congress believed that the disparate treatment of transportation costs in the statute was consistent with the Code.[9] There

[9] Congress anticipated the argument that provisions of the 1979 Act should be interpreted at variance with the Congressional language and intent in order to conform to the arguable requirements of the GATT. Thus, it provided in 19 U.S.C. § 2504(a) that "[n]o provision of any trade agreement . . . , nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States will be given effect under the laws of the United States." This provision was drafted to "preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by the Congress." S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979). "The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Suramerica de Aleaciones Laminadas, S.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) (construing 19 U.S.C. § 2504(a)). Petitioner thus attempts to make the very argument that Congress anticipated and rejected.

is simply no basis for arguing that the plain language of the statute must be disregarded in favor of an alternative interpretation based on the Code.[10]

In this context, it should be noted that Congress is in the process of substantially amending the entire antidumping statute to implement U.S. obligations under the recently negotiated Uruguay Round Agreement. Amendments to the statute proposed by the Administration would moot the issue raised in the petition. Accordingly, in light of the fact that Congress and the Administration have not come to a resolution of whether to amend the antidumping law with respect to this issue, it is premature for the Court to address the issue at this time.

III. THERE IS NO MERIT TO PETITIONER'S NEWLY ASSERTED CLAIM OF A LONGSTANDING ADMINISTRATIVE PRACTICE OF DEDUCTING HOME MARKET TRANSPORTATION COSTS WITHOUT MAKING A CIRCUMSTANCE OF SALE ADJUSTMENT

Petitioner alleges that the Federal Circuit failed to consider evidence indicating that Congress did not intend to prohibit the deduction of transportation costs from FMV. Pet. 19. The only "evidence" cited by petitioner, however, is an alleged practice of the Department of the Treasury (which handled antidumping investigations prior to 1980) of deducting all home market transportation costs without regard to the statutory circumstances of sale provision. For three reasons, however, this claim does not warrant review by this Court: (1) petitioner never raised

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[10] Petitioner also claims that the decision below "will result in the imposition of excessive antidumping duties in this case." Pet. 6. Commerce has already made its decision on remand, however, and the Federal Circuit's decision only changed petitioner's dumping margin from 60.33 percent to 61.85 percent. Commerce Department's Final Results of Redetermination Pursuant to Court Remand, *Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement v. United States*, Court No. 90-10-00508 (Ct. Int'l Trade May 12, 1994).

this claim in the courts below; (2) the Treasury Department never had any such practice; and (3) even if such a practice did once exist, it would have been contrary to the plain language of both the 1921 Act and the current antidumping statute, as discussed above.

This litigation has been underway since 1990. In challenging Commerce's decision to deduct pre-sale home market transportation costs, the Ad Hoc Committee relied in part on Commerce's prior practice of treating pre-sale home market transportation costs as indirect selling expenses, which were not deductible from FMV as a circumstance of sale adjustment.[11] The Federal Circuit's decision acknowledged both this practice and Commerce's 1985 Antidumping Adjustments Methodology study, in which Commerce informed Congress that it lacked authority to deduct home market transportation expenses other than pursuant to the circumstance of sale provision. Pet. App. 9a n.9.[12]

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[11] As discussed above, because pre-sale home market transportation costs were indirect selling expenses, they were deducted only in exporter's sales price comparisons, up to the amount of indirect selling expenses deducted from U.S. price. Post-sale home market transportation expenses were treated as direct selling expenses and were deducted in all instances.

[12] Although petitioner asserts that the court below "seriously mischaracterize[d]" the Commerce Department's 1985 study, Pet. 18 n.21, it is petitioner that mischaracterizes the study. For the first time in this litigation, petitioner claims that the study supports its notion that the Department has authority to deduct both pre-sale and post-sale home market transportation costs under all circumstances. The study, however, notes that, "while the deduction of U.S. product delivery costs is explicitly authorized under [19 U.S.C. § 1677a(d)(2)(A)], there is no such explicit provision for the deduction of foreign market product delivery costs." *See* appendix to this brief at 1a-2a. The study goes on to note Commerce's practice of deducting home market transportation costs only pursuant to the circumstance of sale provision. *Id.* Thus, the study concluded, as did the court below, that Commerce has no inherent authority to deduct all home market transportation costs from FMV. *Id.*

Petitioner now asserts that the Treasury and Commerce Departments in fact have had a different, longstanding practice of deducting all home market transportation costs without reference to the requirements of the circumstance of sale provision. According to petitioner, the Commerce practice cited by the court below was merely a temporary "departure" from a consistent practice otherwise followed for more than 30 years. Pet. 19 n.21. If such a practice ever existed, however, it was incumbent upon petitioner to bring it to the attention of the courts below. Having failed to do so, petitioner may not raise this claim for the first time in this Court. *See, e.g., United States v. Williams*, 112 S. Ct. at 1738-39.

In any event, no such practice ever existed. The sources cited by petitioner, Pet. 14-17, merely establish that the Treasury Department deducted home market transportation costs from FMV. None of these sources shows that the adjustment for transportation costs included pre-sale transportation costs, or that the adjustment was not made as a circumstance of sale adjustment.[13]

Petitioner has, in fact, indulged in selective citation from its own sources. Petitioner neglects to direct the

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[13] The sample price comparisons in the 1957 and 1961 Treasury Department memoranda and the 1979 General Accounting Office report cited by petitioner, Pet. 17 & Pet. App. 81a-82a, do not discuss either the rationale or the statutory authority for the described deductions of transportation costs. For example, the comparison in the 1957 Treasury Department memorandum, Pet. App. 81a, simply deducts "[t]ransportation from factory to purchaser" without further explanation. Because the example deals with direct shipment from factory to purchaser, without an intervening shipment to a distribution warehouse prior to sale, it does not demonstrate how the Treasury Department would have handled a claim for deduction of pre-sale home market transportation expenses from the factory to the warehouse. The other sources cited by petitioner similarly lack explanation and deal only with the cost of shipping from the factory directly to the customer. These are anything but the "clear explanations of administrative practice" claimed by petitioner, Pet. 17.

Court to other portions of the same sources establishing that, at least as long ago as 1966, the Treasury Department deducted home market transportation costs only pursuant to its authority to adjust for differences in circumstances of sale. For example, petitioner cites, Pet. 16-17, to a document reprinted in S.D. Metzger, *Law of International Trade: Documents and Readings* (1966). The Metzger book also reprints the Treasury Department's antidumping regulations as of 1966. A sample dumping margin calculation provided in the regulations as Example 7 (included in the appendix to this brief at 3a) clearly states that the deduction of home market transportation costs was made after "[g]iving due consideration to the circumstances of sale."

Similarly, petitioner ignores crucial information in the 1979 General Accounting Office report cited in the petition. Appendix III to that report cites examples of pricing adjustments claimed by foreign exporters in antidumping investigations under the 1921 Act. The first item on that list, under the heading, "Nature of adjustment," states: "*Circumstances of sale*—inland freight costs from manufacturer's plant to home market customers." Under the heading, "Amount approved," it is indicated that the Treasury Department approved the adjustment. U.S. General Accounting Office, *U.S. Administration Of The Antidumping Act Of 1921*, at 77 (1979) (reprinted in the appendix to this brief at 4a).[14] For these reasons,

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[14] Petitioner's claim of a consistent Treasury Department practice of deducting all home market transportation costs without making a circumstance of sale adjustment also ignores Commerce's March 1980 determination in *Portable Electric Typewriters From Japan*, 45 Fed. Reg. 18,416 (1980). Commerce had just assumed responsibility for antidumping investigations from the Treasury Department in January 1980. In that case, Commerce stated: "Silver Seiko claimed that adjustment to fair value should be made for certain costs of transporting merchandise from the factory to the distribution warehouse. This claim was disallowed, because it was not shown to be an expense directly related to the sale under consideration." *Id.* at 18,418. Thus, less than three months after

there is no basis for petitioner's claim that there was a longstanding administrative practice of deducting home market transportation costs without making a circumstance of sale adjustment.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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August 26, 1994

Commerce's assumption of responsibility for antidumping investigations, Commerce rejected a claimed deduction for pre-sale home market transportation costs under the circumstance of sale provision, determining that such costs were not directly related to the sale at issue. Nothing in *Portable Electric Typewriters* suggests that Commerce's rejection of this adjustment was a departure from the Treasury Department's prior practice.

APPENDIX

APPENDIX

Excerpt from U.S. Department of Commerce Study of Antidumping Adjustments Methodology

* * * *

A. *Foreign Market Delivery and Packing Costs*

The Tariff Act of 1930 ("the statute") directs the Department to compare ex-factory prices, packed for delivery to the United States. In order to effect this comparison, we deduct any delivery costs included in United States and foreign market prices, and adjust the value of the foreign market merchandise by subtracting out foreign market packing costs and adding in U.S. packing costs. However, while the deduction of U.S. product delivery costs is explicitly authorized under section 772(d)(2)(A) of the statute, there is no such explicit provision for the deduction of foreign market product delivery costs. Similarly, while the addition of U.S. packing costs is explicitly authorized under section 773(a)(1) of the statute, there is no such explicit provision for the deduction of foreign market packing costs. Under current practice, the Department deducts foreign market delivery costs and foreign market packing costs pursuant to the implicit authority granted under section 773(a)(4)(B) of the statute to make "due allowance" for "other differences in circumstances of sale."

In *Brother Industries, Ltd. v. United States* (540 F. Supp. 1341 (CIT 1982)), the Court of International Trade upheld both practices, stating "if inland freight and/or packing costs are higher for sales made in the home market than in sales to the United States, the home market price should be adjusted downward, relative to the United States price, to reflect the differing circumstances that exist. Of course, the converse would be true if these types of costs were higher for sales to the United States."

The Department believes that fairness dictates that its current practice be continued and thus would support codification of the practice.

* * * *

Excerpt from S.D. Metzger, Law of International Trade: Documents and Readings

* * * *

Example 7. A foreign producer sells for consumption in the country of exportation at $105 a unit, delivered anywhere within the country of exportation. He has no f.o.b. factory price for home consumption. He sells to the United States f.o.b. factory for $100 a unit. Evidence indicates that it costs the producer on the average $0.50 a unit to deliver on home consumption sales.

Giving due consideration to the circumstances of sale, the sales to United States purchasers at $100 a unit will be deemed to be sales at less than fair value. Should the delivery cost on home consumption sales average $5 a unit instead of $0.50, the sales to United States purchasers at $100 a unit will not be deemed to be sales at less than fair value.

* * * *

Excerpt from 1979 General Accounting Office Report

APPENDIX III

EXAMPLES OF PRICING ADJUSTMENTS SUBMITTED BY MANUFACTURERS FOR MERCHANDISE SUBJECT TO FINDING OF DUMPING

Commodity/ Country	Nature of adjustment	Amount requested	Amount approved	Time required to respond (note a)
Japan:				
Roller chain	*Circumstances of sale*—inland freight costs from manufacturer's plant to home market customers.	Varied from 15 yen to 635 yen depending on destination	Approved actual amount claimed for deliveries to each customer.	8½ months
Roller chain	*Circumstances of sale*—interest expense—home market sales are usually paid by promissory note. Export sales generally require immediate cash payment.	1.76 percent for 1st year of sales.	1.76 percent	8½ months
		2.91 percent for 2nd year of sales.	2.91 percent	8½ months
Roller chain	*Circumstances of sale*—expenses of sales activities—cost of salesmen's salaries, retirement allowances, travel, entertainment, etc.	1.59 percent for 1st year of sales.	Claim disallowed for both years. Manufacturer did not satisfactorily demonstrate that these expenses were directly related to sales in question.	8½ months
		1.51 percent for 2nd year of sales.		8½ months
Roller chain	*Circumstances of sale*—advertising expenses incurred for home market sales.	.35 percent for 1st year of sales.	Disallowed because of failure to demonstrate direct relationship to sales.	8½ months
		.11 percent for 2nd year of sales.		8½ months
Roller chain	*Circumstances of sale*—warehouse expense—home market sales are distributed from a warehouse whereas export sales are distributed from the plant.	Varied from 0 to 945 yen, depending upon size of chain involved.	Disallowed because of failure to demonstrate direct relationship to sales.	8½ months
Roller chain	*Circumstances of sale*—warranty expense—home market sales are given a 1-year warranty whereas export sales contain no warranty.	.29 percent for 1st year of sales.	.28 percent	8½ months
		.21 percent for 2nd year of sales.	.0793 percent	8½ months
Roller chain	*Circumstances of sale*—cost for packaging material and labor for export sales.	Amount claimed varied for each of 53 types of roller chains.	Approved	8½ months
Roller chain	*Similar merchandise*—Additional manufacturing costs to cut chains for export to specified lengths.	1572 yen for 1st year of sales.	Considered irrelevant because sufficient sales of cut chain existed in home market to make valid comparison of prices.	8½ months
		1948 yen for 2nd year of sales.		8½ months

SUPREME COURT, U.S.
FILED
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No. 93-1890

In the Supreme Court of the United States

OCTOBER TERM, 1994

CEMEX, S.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of price comparison and calculation of the antidumping duty owed for foreign goods sold in the United States at less than fair market value in their country of export, the federal antidumping statute, 19 U.S.C. 1673 *et seq.* (1988 & Supp. IV 1992), prohibits the Department of Commerce from deducting pre-sale transportation costs for the goods sold within the country of export in order to make a fair comparison to the United States price of the goods.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 13 F.3d 398. The opinion of the United States Court of International Trade (Pet. App. 13a-25a) is reported at 787 F. Supp. 208.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1994. A petition for rehearing was denied on March 1, 1994. Pet. App. 64a-65a. The petition for writ of certiorari was filed on May 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States antidumping laws, 19 U.S.C. 1673 *et seq.* (1988 & Supp. IV 1992), protect domestic industries against dumping, that is, the sale of foreign manufactured goods in this country at less than the fair market value of those goods in the country of manufacture. See *Zenith Elecs. Corp.* v. *United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993). Under 19 U.S.C. 1673, the Secretary of Commerce[1] is authorized to investigate dumping, and if dumping is determined to exist and the International Trade Commission (ITC) also determines that the dumping has injured or threatens to injure a domestic industry, 19 U.S.C. 1677(2), the Secretary may impose a duty on the dumped merchandise equal to the "dumping margin," *i.e.*, the amount by which the foreign market value (FMV) of the imported merchandise exceeds the United States price (USP).

An antidumping duty investigation may be initiated by the Secretary, 19 C.F.R. 353.11, or upon petition by "any interested party," 19 C.F.R. 353.12 (defined as producers or workers involved in the production of "the like product" in the United States, 19 C.F.R. 353.2(k)(3)-(6)). After giving notice of an antidumping duty investigation in the Federal Register, 19 C.F.R. 353.11, 353.13, the Secretary examines sales of the merchandise over a relevant period of time, see 19 C.F.R. 353.42, and within 160 days publishes a preliminary determination, 19 C.F.R. 353.15, estimating the dumping margin, if any, and inviting presentation of argument by interested

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[1] The Secretary of the Treasury was originally named as administering authority of the antidumping law. 19 U.S.C. 1677(1). In 1980, responsibility for administering the antidumping laws was transferred to the Department of Commerce. See Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,274-69,275 (1979).

parties, see 19 C.F.R. 353.38. The Secretary then makes and publishes a final determination and estimate of the dumping margin, if any, 19 C.F.R. 353.20, and issues an Antidumping Duty Order directing the Customs Service to assess the antidumping duties on the merchandise, 19 C.F.R. 353.21. An interested party may seek judicial review of the Secretary's final antidumping determination before the Court of International Trade (CIT), 19 U.S.C. 1516a, which has exclusive jurisdiction over such actions, 28 U.S.C. 1581(c). Appeal from a final decision of the CIT lies exclusively in the Court of Appeals for the Federal Circuit. 28 U.S.C. 1295(a)(5).

2. The central issues in dumping cases are the calculations of FMV and USP. See *Zenith Elecs. Corp.*, 988 F.2d at 1576. FMV is ordinarily calculated as the price at which the merchandise in question (or similar merchandise) is sold in the ordinary course of trade in the country where it is produced, 19 U.S.C. 1677b(a)(1)(A); 19 C.F.R. 353.46(a)(1).[2] USP is either the "purchase price"[3] or the "exporter's sales price"[4] of the

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[2] If there are insufficient reliable data about such sales, FMV may be calculated as the price at which the merchandise is exported to countries other than the United States, 19 U.S.C. 1677b(a)(1)(B), or by a "constructed value" based on material, labor, and other costs, 19 U.S.C. 1677b(a)(3) and (e).

[3] "Purchase price" is the price at which a buyer in the United States agrees to purchase the merchandise from a reseller or from the foreign manufacturer. *Zenith Elecs. Corp.*, 988 F.2d at 1577; 19 U.S.C. 1677a(b). That measure of USP is used when the United States importer is unrelated to the foreign manufacturer. *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). See Pet. App. 2a n.2.

[4] "Exporter's sales price" is the price at which the foreign manufacturer or its agent agrees to sell the merchandise in the United States. *Zenith Elecs. Corp.*, 988 F.2d at 1577; 19 U.S.C. 1677a(c). The antidumping law attempts to construct value on the

merchandise, whichever is appropriate. 19 U.S.C. 1677a(a). The statute provides for upward and downward adjustments to both FMV and USP calculations to account for factors unrelated to dumping that might distort the accuracy of the dumping margin as a measure of less-than-fair-value United States sales. As the Federal Circuit has observed, "[f]oreign market value and United States price represent prices in different markets affected by a variety of differences in the chain of commerce by which the merchandise reached the export or domestic market. Both values are subject to adjustment in an attempt to reconstruct the price at a specific, 'common' point in the chain of commerce, so that value can be fairly compared on an equivalent basis." *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1571-1572 (1983), cert. denied, 465 U.S. 1022 (1984). Thus, the statute addresses such factors as export packing costs, differences in commercial quantities sold at home and by export, and rebated or uncollected taxes or duties (see 19 U.S.C. 1677a(d), 1677b(a)(1) and (4)), which could affect USP differently from FMV and could lead to an inaccurate comparison if not accounted for. *Zenith Elecs. Corp.*, 988 F.2d at 1577.

At issue in this case is the proper treatment of one such adjustment: the adjustment for transportation costs of the finished product. The statute specifies that the USP shall be reduced by the amount, if any, included in that price attributable to the "costs, charges, and

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basis of arm's length transactions; thus USP is determined by the exporter's sales price when the importer is related to the foreign manufacturer. In such cases, an arm's length transaction does not occur until the goods are resold by the importer/agent to a retailer or to the public. *Smith-Corona Group*, 713 F.2d at 1572. See Pet. App. 2a-3a n.2.

expenses * * * incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. 1677a(d)(2)(A). The provision for calculating FMV, 19 U.S.C. 1677b, contains no similarly express provision for reducing FMV because of shipment costs for merchandise sold to a customer in the same country (variously called "home-market movement expenses" or "inland freight expenses"). The Secretary has therefore invoked other sources of authority in the antidumping laws to adjust for home-market movement expenses in order to achieve a fair, "apples-to-apples" comparison between USP and FMV.

Before introducing the practice challenged in this case, the Secretary relied on the "circumstances-of-sale" adjustment allowed under 19 U.S.C. 1677b(a)(4)(B) to deduct from FMV the portion of home-market movement costs directly related to particular sales (typically, post-sale transportation costs).[5] And, where

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[5] See *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 57 Fed. Reg. 4981 (1992). Section 1677b(a)(4)(B) authorizes a downward adjustment to FMV where "it is established to the satisfaction of [the Secretary] that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to * * * differences in circumstances of sale." That provision grants considerable discretion to the Secretary, see *Smith-Corona Group*, 713 F.2d at 1575, who has interpreted it generally to limit the allowance "to those circumstances which bear a direct relationship to the sales compared," 19 C.F.R. 353.56(a). Post-sale expenses typically meet that test. Pre-sale expenses, in contrast, typically are considered to be "indirect" general costs of doing business in the industry, and thus not deductible from FMV as a "circumstance-of-sale," see *LMI-LA Metalli Industriale, S.p.A.* v. *United States*, 912 F.2d 455, 457 (Fed. Cir. 1990), although in some circumstances pre-sale expenses can be considered

USP was based on exporter's sales price, the Secretary used the "exporter's sales price" offset (ESP), 19 C.F.R. 353.56(b)(2), to deduct pre-sale home-market transportation costs from FMV.[6] The Federal Circuit upheld the use of that offset in *Smith-Corona Group*, 713 F.2d at 1578-1579 (construing the predecessor regulation, 19 C.F.R. 353.15(c) (1980)). That regulatory offset does not apply, however, when the USP side of the comparison is based on purchase price. Thus, under prior practice, the Secretary could deduct *post*-sale transportation costs on both the USP and FMV sides of the calculation regardless of the type of USP involved, but could typically deduct *pre*-sale home market transportation costs from FMV only where USP was based on the exporter's sales price.[7] The Secretary therefore introduced a pre-sale movement expense factor into the calculation of FMV to prevent FMV from being skewed when USP is based on purchase price.

"direct," see *Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 58 Fed. Reg. 6210 (1993).

[6] The ESP offset allows a deduction from FMV to balance the special deduction required from USP, when USP is based on exporter's sales price, for "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise", 19 U.S.C. 1677a(e)(2) (*i.e.*, indirect expenses). The offset allows the deduction of home market indirect selling expenses up to the amount of indirect selling expenses deducted from USP.

[7] Pre-sale home-market transportation costs could also be deducted from FMV when USP was based on purchase price in those limited circumstances where those costs are sufficiently related to the sales under consideration to qualify for a circumstance-of-sale adjustment. See note 5, *supra*.

Beginning with the antidumping determination in this case, see Pet. App. 18a-20a, the Secretary, drawing on his authority and expertise in the implementation of the antidumping laws, determined that *all* ex-factory movement expenses should be deducted from *all* calculations of FMV to the same degree they are deducted from USP. The purpose of that adjustment is to achieve the statutory goal of a fair comparison between USP and FMV regardless of the type of USP involved. As the Secretary has explained:

> In the past, the Department has treated pre-sale movement expenses incurred on home market sales as either production costs or indirect selling expenses. However, we have reconsidered our treatment of these expenses. The Department does not distinguish between pre-sale and post-sale movement charges when calculating an ex-factory U.S. price. Therefore, to ensure an "apples-to-apples" comparison, the Department has deducted all movement charges, presale and post-sale, from foreign market value.

Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan, 56 Fed. Reg. 26,056 (1991) (citing the final administrative determination in this case, *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 29,244 (1990)).

3. In 1989, an antidumping investigation was initiated by a petition filed by respondent Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement (Ad Hoc Committee) alleging that imports of Mexican gray

portland cement and clinker[8] were being sold in the United States at less than fair value within the meaning of the antidumping laws. Petitioner CEMEX, S.A., and respondent Apasco, S.A. de C.V., were named as respondents in the Ad Hoc Committee's administrative petition. See 54 Fed. Reg. 43,190 (1989); Pet. App. 13a-14a.

The Secretary issued preliminary, *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 13,817 (1990), and final, *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 29,244-29,253 (1990) (Pet. App. 26a-63a), determinations concluding that the merchandise was being sold in the United States at less than fair value and estimating the margins of dumping. An antidumping duty order finalized these amounts. *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 35,443 (1990). The dumping margins reflected deductions from FMV, *inter alia*, for inland freight expenses, including pre-sale inland freight expenses where USP was based on purchase price. See 55 Fed. Reg. at 29,251 (Pet. App. 55a). The Secretary rejected the contention that the deduction for foreign inland freight was unauthorized by statute, stating (*ibid.*):

> We have deducted from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an "apples-to-apples" comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV.

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[8] Gray portland cement is an hydraulic cement and the primary component of concrete. Clinker is an intermediate material produced when manufacturing cement, and is ground into finished cement. Pet. App. 28a.

The Ad Hoc Committee then brought this action in the CIT, contending, *inter alia* that Commerce lacked authority to adjust FMV, and hence to lower the dumping margins assessed, by deducting pre-sale inland freight expenses from FMV in a case involving purchase price imports. See Pet. App. 13a-15a, 17a-21a. The CIT rejected that claim. *Id.* at 17a-21a. It concluded that Commerce's decision to compare FMV and USP at the ex-factory level on both sides was permissible and reasonable, because "the statute would seem to allow [Commerce] some room to make the fairer choice," and "[t]he deduction of pre-sale inland freight expenses on the home market side engenders a more accurate and meaningful comparison." *Id.* at 21a.

4. The Court of Appeals for the Federal Circuit reversed. Pet. App. 1a-12a. The court stated that "FMV and USP are intimately related concepts" within the statutory scheme of the antidumping statute, which "revolves around the difference between the two." *Id.* at 8a. In the court's view, "[f]rom the Act's beginning * * * it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them." *Ibid.* Accordingly, the court held that, because "Congress included a deduction for transportation costs from USP but not from FMV[,] * * * Congress did not intend pre-sale home-market transportation costs to be deducted from FMV." *Ibid.* The court thus determined that the statute was not silent or ambiguous on that point within the meaning of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and it was unnecessary to consider, or defer to, Commerce's interpretation. Finally, the court stated that "[e]ven if the statute's 'primary goal'" of achieving fair comparisons "may seem to be ill-served by not allowing the deduction from

FMV," it "does not justify reading into the statute agency discretion that clearly is not there." Pet. App. 10a.

ARGUMENT

In our view, the court of appeals erred in inferring that Congress intended to deny inland freight deductions from FMV because it addressed the topic of transportation expenses explicitly only in defining USP. Not only does that holding override the Secretary's discretion to fill in gaps in the statutory scheme, it conflicts with the antidumping statute's central goal of making fair comparisons between foreign market sales price and United States sales price. The holding in this case, however, does not affect the Department of Commerce's authority to adjust FMV for home-market transportation costs in a majority of situations, and, in any event, it is likely that Congress will soon clarify Commerce's authority to do so in all appropriate cases under legislation that will implement the current General Agreement on Tariffs and Trade (GATT). Accordingly, this Court's intervention is not warranted.

1. The court of appeals held that Congress had an unambiguous intention to foreclose an inland freight deduction from FMV; the court therefore declined to consider whether deference to the Secretary's policy of deducting such costs was warranted under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The statute, however, is silent as to any type of home-market transportation cost adjustment to FMV. See 19 U.S.C. 1677b. This Court has instructed that when a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"; the

"court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 843-844.

In declining to apply that principle, the court of appeals determined that the statutory structure manifested a clear and unambiguous legislative intent. The court inferred from Congress's provision for a transportation cost deduction from USP, see 19 U.S.C. 1677a(d)(2), that Congress intended to deny a parallel deduction from FMV. Pet. App. 6a-8a. That inference rested (*ibid.*) on the canon of construction that when Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). That general presumption, however, is not an invariable rule. See, *e.g.*, *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989) (holding that the definition of a term in one title of a statute applies also to the same *undefined* term in another title of the statute, notwithstanding the concurrence's reliance, see *id.* at 252, on the canon cited in *Russello*). Where, as here, the application of a canon of construction produces a result that is squarely at odds with the statute's central objective, courts should hesitate to conclude that Congress compelled that result through silence.

In this case, the court should have moved to the second step of *Chevron* and determined whether the agency has supplied a "reasonable," and thus permissible, interpretation of the statutory silence. 467 U.S. at 844. Commerce's interpretation here is reasonable, because the deduction of transportation costs from FMV is designed "to ensure an 'apples-to-apples' comparison" of

FMV and USP, and thus to determine the dumping margin fairly. *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan*, 56 Fed. Reg. 26,056 (1991). "Without the deduction from FMV, the comparison is apples to oranges: ex-factory prices in the United States but the *ex-warehouse* price in the foreign market." Pet. App. 6a.

Commerce's approach to this issue parallels the approach that the court of appeals specifically endorsed in *Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). In *Smith-Corona*, the court affirmed Commerce's authority to allow a deduction from FMV, where no deduction was provided by statute, to balance a deduction expressly required by the statute for calculating USP. At issue there was the "exporter's sales price offset," now codified at 19 C.F.R. 353.56(b)(2), which comes into play when the USP side of the calculation is based on exporter's sales price. When exporter's sales price is the measure of USP, the statute requires deductions from it, *inter alia*, for general (*i.e.*, indirect) selling expenses incurred in the United States. 19 U.S.C. 1677a(e)(2).[9] As in this case, however, the statute is

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[9] In addition to the adjustments to USP applicable to both purchase price and exporter's sales price, the statute states:

> For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of —
>
> * * *
>
> (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise * * *

19 U.S.C. 1677a(e)(2).

silent as to a parallel deduction from FMV for such expenses of selling the merchandise on the home market side. Rejecting the very sort of argument it accepted here, the court of appeals deferred to Commerce's authority, in the face of legislative silence on the question, to make an adjustment to FMV "to achieve a broader statutory purpose [of fair value comparisons] otherwise frustrated because" of the statutory method of computing USP. 713 F.2d at 1579.[10]

The court of appeals' earlier decision in *Zenith Elecs. Corp.* v. *United States*, 988 F.2d 1573 (1993), on which it principally relied here (Pet. App. 7a), is inapposite. In *Zenith*, the court disallowed Commerce's use of the circumstance-of-sale provision, 19 U.S.C. 1677b(a)(4)(B), to adjust for a factor affecting FMV (taxes that are assessed on home market sales, but that are not assessed on exports), where Congress had specifically provided another method, 19 U.S.C. 1677a(d)(1)(C), to account for the impact of such home market taxes in comparing FMV and USP. 988 F.2d at 1581-1582.[11] The court held

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[10] The court of appeals declined to analyze this case under *Smith-Corona* on the basis that "[t]he general prescriptions of *Smith-Corona*, which serve to guide Commerce in making reasonable interpretations of the Antidumping Act, do not apply where the Act itself clearly expresses the intent of Congress." Pet. App. 10a (citing *Zenith*, 988 F.2d at 1582). As we have shown, however, the court's premise—that the statute clearly expresses Congress's intent regarding the treatment of home-market transportation costs—was erroneous.

[11] To the degree such home market taxes are not subtracted in making the FMV/USP comparison, they will inflate the measure of FMV, and hence any antidumping duty, for reasons unrelated to value. USP, on the other hand, is determined net of U.S.-imposed sales taxes, import charges, or duties. 19 U.S.C. 1677a(a)-(c) and (d)(2)(A).

that even though the method prescribed in Section 1677a(d)(1)(C) did not completely neutralize the impact of home market taxes in that case,[12] Congress, by expressly addressing the home market tax problem in one way, had foreclosed Commerce's discretion to handle it in another. 988 F.2d at 1581-1582. The court also noted that to use the general circumstance-of-sale provision to correct for the impact of home market commodity taxes would "writ[e] the specific tax adjustment section [1677a(d)(1)(C)] out of the statute" and render it "completely superfluous." *Id.* at 1581.

In contrast, Congress has not directly addressed the question of how to account for the impact of home-market transportation costs in comparing FMV and USP. The provision for subtracting transportation costs in calculating USP, 19 U.S.C. 1677a(d)(2)(A), accounts for such costs only in United States sales; it

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[12] Instead of subtracting from FMV the amount of the taxes that would be assessed on home market sales that are not assessed on exports, Section 1677a(d)(1)(C) directs Commerce to *add* such taxes to *USP*. Where the taxes are assessed on a per-unit basis, or where home-market price and USP are equivalent, such an adjustment has the same effect as deducting the home-market taxes from FMV. In *Zenith*, however, taxes were assessed in the home market (Japan) as a percentage of price, and the pre-tax home-market price was higher than USP. Thus, imputing the home-market taxes as an adjustment to USP, as required by Section 1677a(d)(1)(C), exaggerated the dumping margin. See 988 F.2d at 1578. Commerce attempted to correct for that "multiplier effect" by making an additional, circumstance-of-sale adjustment to FMV to eliminate the impact of the multiplier. In addition to finding that adjustment precluded because of the specific provision of Section 1677a(d)(1)(C), the court of appeals also held that it would not qualify as a circumstance-of-sale adjustment, because the multiplier effect is not created by home market conditions but is instead a product of the dumping itself. 988 F.2d. at 1581.

does not address the problem of how to adjust for the impact of transportation costs when calculating FMV based on sales in the home market. Moreover, unlike the situation in *Zenith*, neither Section 1677a(d)(2)(A) nor any other statutory provision is rendered superfluous by Commerce's deduction of home-market transportation costs. Section 1677a(d)(2)(A) continues to provide the basis for deducting transportation costs in determining the ex-factory United States price of allegedly dumped imported goods. By making a parallel transportation cost deduction in calculating FMV in this case, Commerce was simply (as the court of appeals recognized, see Pet. App. 6a, 10a-11a) ensuring an "apples-to-apples" comparison at the ex-factory level in all situations.

2. Despite the court of appeals' error, review by this Court is not warranted. The decision below does not have a significant impact on Commerce's ability to make fair comparisons between USP and FMV in most cases. The decision has no impact in cases in which there are no (or no appreciable) inland freight costs in home market sales. And, where there are such costs, Commerce can continue to account for them in calculating FMV where USP is based on exporter's sales price, see note , *supra*, or where such costs qualify for a circumstance-of-sale adjustment, see note 5, *supra*. The ruling here thus has a significant impact on dumping margins only when the USP/FMV comparison involves United States purchase price sales paired with home-market sales that involve substantial pre-sale transportation costs *and* those costs do not qualify for a circumstance-of-sale adjustment.

Moreover, Commerce's authority to adjust FMV for home-market transportation costs as a general matter is likely to be clarified in legislation that the Admini-

stration will shortly submit to Congress for the implementation of the 1994 General Agreement on Tariffs and Trade (1994 GATT). See Office of the United States Trade Representative *Uruguay Round Of Multilateral Trade Negotiations General Agreement on Tariffs and Trade* (GPO 1994) [*Uruguay Round*]. Article 2 of the 1994 GATT, "Determination of Dumping," provides (¶ 2.4) that a "fair comparison" between "export price" (the equivalent of USP under current United States law) and "normal value" (the equivalent of FMV under current United States law) "shall be made at the same level of trade, normally at the ex-factory level," and that "[d]ue allowances shall be made in each case" for certain enumerated factors "and any other differences which are also demonstrated to affect price comparability." *Uruguay Round* at 147. Currently, the Administration's proposed implementing legislation specifically authorizes Commerce to adjust "normal value" (formerly FMV) to account for *all* home-market transportation costs. Staff of the House Comm. on Ways and Means, 103d Cong., 1st Sess., *Draft Legislation for the Administration's Implementing Proposals on the Uruguay Round Antidumping Agreement and Corresponding Provisions of the Subsidies Agreement* 96-102 (Comm. Print 1994). That proposal is consistent with the 1994 GATT's emphasis on achieving a fair comparison between domestic and foreign market sales at the ex-factory level of trade. If the legislation is enacted, the ruling of the court of appeals in this case will have minimal prospective significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CEMEX, S.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
and APASCO, S.A. de C.V.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONER'S REPLY BRIEF

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RULE 29.1 STATEMENT

A complete statement for CEMEX, S.A. in accordance with Rule 29.1 was included in CEMEX's Petition for Certiorari in this case. The information contained in that statement has not changed.

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner CEMEX, S.A. is filing this reply brief to address two new arguments raised in the Response Briefs filed by the Respondents United States and the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement in opposition to CEMEX's Petition for Certiorari in this case. In accordance with the rules of this Court, this brief addresses only issues which were not already discussed in CEMEX's Petition for Certiorari.

In its brief in opposition to CEMEX's Petition for Certiorari, the United States fully agrees with CEMEX's substantive position, acknowledging that in its decision in *Ad Hoc Committee v. United States,* 13 F.3d 398 (Fed.

Cir. 1994), the Court of Appeals for the Federal Circuit "erred in inferring that Congress intended to deny inland freight deductions from FMV [(foreign market value)] because it addressed the topic of transportation expenses explicitly only in defining USP." *Brief for the United States in Opposition* at 10. In spite of agreeing with CEMEX that the Federal Circuit's decision was erroneous, however, the United States argues that the Court should nonetheless deny CEMEX's Petition for Certiorari because relatively few cases are affected by the decision. The United States further argues that CEMEX's Petition should be rejected because it is likely that Congress will soon pass legislation that will address the substantive complaint in this case. *Id.* A similar argument is also raised briefly by Respondent Ad Hoc Committee. *Brief in Opposition For the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* at 13.

Both of these arguments ignore the injury to CEMEX that results from the decision of the Federal Circuit, as well as the injury to various other producers and importers who have been and will yet be adversely affected by the decision below. The Court should be aware that a significant number of Department of Commerce proceedings have *already* been affected by the *Ad Hoc Committee* decision, and even more are likely to be affected in the future if the case remains law. Moreover, even if relatively few cases were affected by the decision (which, again, is not the case), the individual respondents in those cases would nonetheless suffer real monetary loss if dumping margins are inflated as a result of the *Ad Hoc Committee* decision.

Furthermore, the legislative remedy referred to by the United States may or may not be enacted into law, and even if it is, it is currently drafted to apply only *prospectively*. It is uncertain whether the GATT implementing legislation will be passed by Congress with the draft provision addressing this issue intact, given that the language is included only in the House, and not in the Senate, ver-

sion of the legislation, and given that influential voices in Congress are calling for delay in the introduction of the final bill. Even more importantly, the new language would, as currently drafted, apply only to investigations and administrative reviews initiated *after* the date the legislation becomes effective. For CEMEX, the first four administrative reviews of the antidumping duty order, covering four years of trade valued at approximately $125 million, have already been initiated, and these, as well as various other proceedings already before the Department of Commerce and the U.S. Court of International Trade, would remain subject to the holding in *Ad Hoc Committee*, a case the United States acknowledges was decided incorrectly.

I. A SIGNIFICANT NUMBER OF DEPARTMENT OF COMMERCE INVESTIGATIONS HAVE ALREADY BEEN AFFECTED BY THE *AD HOC COMMITTEE* DECISION

In its brief in opposition, the United States first claims that "[t]he decision below does not have a significant impact on Commerce's ability to make fair comparisons between USP and FMV *in most cases.*" *Brief of the United States in Opposition* at 15 (emphasis added). The government's statement obscures the fact that the issue of deducting pre-sale transportation expenses from foreign market value does arise in a significant number of the antidumping cases brought before the Department of Commerce. It also ignores the fact that in nearly every case, Commerce makes a deduction from foreign market value for *post*-sale transportation expenses under either the circumstances of sale (19 U.S.C. § 1677b(a)(4)(B)) or the ESP offset (19 CFR § 353.56(b)(2)) provisions. Such deductions have also already been questioned under the holding of *Ad Hoc Committee*.

The Court should be aware that in addition to the Mexican cement investigation at issue in this litigation, and the four administrative reviews thus far resulting therefrom, the deduction of pre-sale transportation expenses

was raised in each of the following proceedings before the Commerce Department in just the past few years: *Color Television Receivers From the Republic of Korea,* 59 Fed. Reg. 21,958 (1994); *Oil Country Tubular Goods From Canada,* 59 Fed. Reg. 18,798 (1994); *Gray Portland Cement and Clinker From Japan,* 59 Fed. Reg. 6,614 (1994); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom,* 58 Fed. Reg. 39,729 (1993); *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 57 Fed. Reg. 9,105 (1992); and *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan,* 57 Fed. Reg. 4,960 (1992). *See also Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, from Japan,* 58 Fed. Reg. 30,018 (1993) (deduction of pre-sale warehousing expenses from foreign market value permitted pursuant to rationale used by Commerce Department in Mexican cement case). In the determinations above which predated the Federal Circuit's decision in *Ad Hoc Committee,* the Department of Commerce agreed that the pre-sale transportation (or warehousing) expenses in the home market should be fully deducted from foreign market value in order to ensure a fair, ex-factory to ex-factory comparison between foreign market value and U.S. price. In the determinations published after the decision, the Commerce Department ceased to make a full deduction for pre-sale transportation expenses on the basis of its inherent authority to make equitable price comparisons, citing the Federal Circuit's *Ad Hoc Committee* decision. Notably, the orders in each of these cases will continue to be subject to administrative reviews, where the same issue is likely to arise time and time again, giving the *Ad Hoc Committee* decision continuing influence over at least eight ongoing proceedings. Moreover, it is important to note that the cases cited above are those in which the deduction of pre-sale transportation expenses

was controversial. The issue undoubtedly arises in many other cases as well—most likely, in any case where merchandise is warehoused at a distance from the factory prior to sale in the home market.

The Department of Commerce has continued to deduct *post*-sale transportation expenses from foreign market value under the circumstance of sale provision and, in exporter's sales price cases, under the ESP offset provision, claiming that this approach is in keeping with the holding of *Ad Hoc Committee*. For example, in *Stainless Steel Bar From India*, 59 Fed. Reg. 39,733 (1994), Commerce noted that "[i]n light of the Court of Appeals for the Federal Circuit's (CAFC) decision in *Ad Hoc Committee* . . ., the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. Instead, we will adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56(a) and the exporter's sales price offset provision of 19 CFR 353.56(b)(2), as appropriate." 59 Fed. Reg. at 39,735. Commerce went on to deduct post-sale home market transportation expenses under the circumstance of sale provision.[1] The Commerce Department made similar determinations in *Stainless Steel Bar From Italy*, 59 Fed Reg. 39,736 (1994); *Stainless Steel Bar From Spain*, 59 Fed. Reg. 39,740 (1994); *Phthalic Anhydride From Venezuela*, 59 Fed. Reg. 27,532 (1994); *Color Negative Photographic Paper and Chemical Components Thereof From Japan*, 59 Fed. Reg. 16,177 (1994); and *Calcium Aluminate Cement, Cement Clinker*

[1] As explained in greater detail in the *Ad Hoc Committee* opinion, under the circumstance of sale provision, only costs directly related to the sales at issue can be deducted from foreign market value. Typically, the Department of Commerce holds post-sale transportation costs to be directly related to sales, while pre-sale costs are generally found to be indirect. This generally prevents pre-sale transportation costs from being deducted from foreign market value under the circumstance of sale provision. *See Petition For Certiorari* at 18a-19a, n.2.

and Flux From France, 59 Fed. Reg. 14,136 (1994). In each of these cases, Commerce cited *Ad Hoc Committee* as affecting its methodology for calculating foreign market value.

While the Commerce Department may believe that it can avoid the impact of the *Ad Hoc Committee* decision at least in cases where the home market transportation expenses were incurred post-sale, by making a deduction under the circumstance of sale or ESP provisions, it is not at all clear whether this interpretation will prevail in future cases interpreting the holding of *Ad Hoc Committee.* At a minimum, the case prohibits Commerce from making any deduction of home market transportation expenses from foreign market value on the basis of its "inherent authority" to make fair comparisons between foreign market value and U.S. price. The full reach of the decision, however, is not yet known. Respondent Ad Hoc Committee has already argued that the Federal Circuit's opinion should be read not only as prohibiting the deduction of pre-sale transportation expenses from foreign market value on the basis of "inherent authority" to make fair comparisons, but as *also* prohibiting the deduction of such expenses under the circumstance of sale provision. *See Plaintiff's Response to CEMEX's Comments on the Commerce Department's Final Results of Redetermination Pursuant to Court Order,* Court of International Trade No. 90-10-0508 (July 22, 1994). If Ad Hoc Committee's interpretation of the Federal Circuit's decision prevails, it would preclude the deduction of all home market transportation expenses from foreign market value under *any* provision.[2] The decision would thus render each of the

[2] Although *Ad Hoc Committee* deals exclusively with pre-sale home market transportation costs, the rationale used by the Federal Circuit might be applied equally to post-sale transportation costs, since these are not specifically enumerated as a deduction on the foreign market value side either, while they are enumerated on the U.S. price side. Hence, if pre-sale transportation expenses

cases involving post-sale transportation expenses listed in the foregoing paragraph vulnerable to attack under *Ad Hoc Committee,* since Commerce's response to *Ad Hoc Committee* in those cases was simply to resort to the circumstance of sale provision.

Therefore, the decision in *Ad Hoc Committee* will henceforth severely limit Commerce from making an adjustment to foreign market value for pre-sale inland transportation expenses in future administrative reviews in any of the cases discussed above (as it already has in the most recent determinations), and may prevent such adjustments for post-sale transportation expenses, as well. The decision will thus prevent Commerce from making equitable comparisons of U.S. price and foreign market value in those cases. In proceedings subject to ongoing judicial review, the Department will be compelled to go back and adjust existing determinations in accordance with the Court's opinion. In fact, the deduction of pre-sale transportation expenses in the three bearings cases alone has already generated *seven* decisions by the Court of International Trade remanding proceedings to the agency in the wake of *Ad Hoc Committee. See The Torrington Company v. United States,* 18 CIT —, 850 F. Supp. 7 (1994); *The Torrington Company v. United States,* 18 CIT —, 850 F. Supp. 12 (1994); *Federal-Mogul Corporation v. United States,* 18 CIT —, Slip Op. 94-40 (March 7, 1994); *The Timken Company v. United States,* 18 CIT —, Slip Op. 94-41 (March 7, 1994); *The Timken Company v. United States,* 18 CIT, Slip Op. 94-87 (May 27, 1994); *The Timken Company v. United States,* 18 CIT —, Slip Op. 94-95 (June 9, 1994; and *The Timken Company v. United States,* 18 CIT —, Slip Op. 94-107 (July 1, 1994).

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cannot be deducted from foreign market value under the circumstance of sale provision under the rationale of *Ad Hoc Committee,* neither can post-sale transportation expenses.

In the past three years alone, the Commerce Department has therefore conducted numerous proceedings which either have already been affected or which may be affected by the *Ad Hoc Committee* decision, and the decision is likely to have an impact on many more to come. Contrary to the Government's position, therefore, the decision does have a very broad sweep, and this Court should not reject CEMEX's petition on the basis of any perceived lack of effect.

II. THE FACT THAT THE URUGUAY ROUND LEGISLATION *MAY* ADDRESS THE DEDUCTION OF PRE-SALE TRANSPORTATION EXPENSES *PROSPECTIVELY* IS NOT GROUNDS FOR THIS COURT TO DENY THE PETITION FOR CERTIORARI

The United States further argues that this Court should reject CEMEX's Petition for Certiorari because "it is likely that Congress will soon clarify Commerce's authority to [adjust FMV for home-market transportation expenses] in all appropriate cases under legislation that will implement the current General Agreement on Tariffs and Trade (GATT)." United States Brief at 10. Ad Hoc Committee in turn argues that pending legislation on this issue makes consideration by this court "premature". Ad Hoc Committee Brief at 13.

While it is true that the House of Representatives' current draft of the implementing legislation for the Uruguay Round GATT Agreement contains a provision that would specifically require the Department of Commerce to deduct home market transportation expenses from foreign market value (described as "normal value" in the draft legislation), the Senate version of the legislation does not contain this language. *See* House Offer: Outstanding Differences Between the House Ways and Means and Senate Finance Committees on Implementing Legislation for the Uruguay Round Trade Agreements (August 22, 1994) at 9. Moreover, in the Senate Finance Committee counteroffer to the House draft legislation, which was just released on

September 13, 1994, the Finance Committee refused to accept the House provision on home market transportation expenses. *See* Senate Committee on Finance Counteroffer to House Committee on Ways and Means Offer of August 22, 1994 on Outstanding Differences on Legislation Implementing the Uruguay Round Trade Agreements (September 13, 1994) at 11. (Reprinted at Appendix 1a). This makes the provision vulnerable to being stripped out of the legislation completely.

In addition, it is by no means certain when or whether the GATT implementing legislation will be enacted. Members of Congress have been unable to agree on crucial elements of the legislation, and several key legislators, including the Senate Minority Leader, have pressed their colleagues to delay consideration of the bill. Thus, passage of the provision correcting the *Ad Hoc Committee* decision is not by any means assured.

More importantly, however, the passage of the legislation as currently drafted by the House of Representatives would not, in any event, provide a remedy for CEMEX as ot merchandise entered into the United States prior to enactment of any remedial legislation. Supreme Court precedent holds that new legislation does not apply retroactively to cases pending at the time of passage unless the statute or the legislative history clearly manifests an intent that it do so. *See, e.g., Kaiser Aluminum & Chemical Corp v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570 (1990); *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 109 S.Ct. 468 (1988); *Bennett v. New Jersey,* 470 U.S. 632, 105 S.Ct. 1555 (1985); *Shwab v. Doyle,* 258 U.S. 529, 42 S.Ct. 391 (1992). Since there is currently no language in the proposed legislation making the provision concerning the deduction of home market transportation expenses retroactive, any potential amendment to the antidumping duty statute would apply only prospectively, and would have no effect on merchandise entered during the first four administrative review periods, valued at over $125 million.

Given that the GATT implementing legislation, in its current form, would not apply retroactively, it would provide no relief to CEMEX in any of the administrative reviews initiated prior to the passage of the legislation (four reviews as of the filing of this brief). Nor would the legislation affect the seven judicial proceedings that have grown out of the bearings cases, which were described earlier, or any judicial proceedings that may arise from the other administrative determinations already affected by the *Ad Hoc Committee* decision, which were described in the foregoing sections. The possibility that Congress might at some time pass legislation correcting prospectively the erroneous decision of the Federal Circuit in *Ad Hoc Committee* should not, therefore, be used as a rationale for denying CEMEX's Petition for Certiorari.

CONCLUSION

For the foregoing reasons, and for the reasons set out in CEMEX's Petition For A Writ Of Certiorari, CEMEX respectfully requests that its Petition be granted.

Respectfully submitted,

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APPENDIX

September 13, 1994

SENATE COMMITTEE ON FINANCE COUNTEROFFER TO HOUSE COMMITTEE ON WAYS AND MEANS OFFER OF AUGUST 22, 1994 ON OUTSTANDING DIFFERENCES ON LEGISLATION IMPLEMENTING THE URUGUAY ROUND TRADE AGREEMENTS

9. Fair Comparison (Article 2.4)

House:

The text of the Ways and Means en bloc amendment reads: "A fair comparison shall be made between the export price and normal value. The Administration's proposal already provides that in order to achieve a fair comparison with the export price, the normal value shall be determined as provided in section 773. A conforming amendment will be made to the Statement of Administrative Action."

Explanation. Amends current law to adopt the Administration's proposal for: (1) making the methodology for calculating a dumping margin for *related party* transactions more similar to that used for *unrelated party* transactions; and (2) modifying the adjustments made to the price of subject merchandise exported to the United States (known as the "export price") and the corresponding price of merchandise sold in the country of export or production (known as "normal value").

The new methodology for calculating a dumping margin provides that the export price is the price at which the subject merchandise is sold in the United States or sold for exportation to the United States to the first purchaser not affiliated with the foreign producer or exporter (*i.e.*, the first unrelated

purchaser). Similarly, normal value is the constructed value or price to the first unrelated purchaser.

Rather than deducting indirect selling expenses such as overhead from the export price and normal value, as required under current law, the House proposal would, to the extent practicable, establish normal value at the same level of trade as the export price. Adjustments to normal value for differences in level of trade would only be granted where such differences actually involve different selling activities, and affect price comparability. Normal value would also be adjusted to account for differences in the quantity of merchandise sold in transactions used to calculate export price and normal value or other differences, to the extent that these differences are shown to affect price comparability, and for physical differences between the merchandise sold in the U.S. and merchandise sold in the foreign market.

Adjustments made, where appropriate, to the export price and/or normal value for packing and transportation expenses, including pre-sale freight expenses, would ensure that dumping margins are calculated on an ex-factory basis, as required by Article 2.4 of the Agreement. Under current law and practice, pre-sale freight expenses are not generally deducted from the price of merchandise in the foreign market, but such expenses are deducted from the U.S. price.

Similarly, consumption taxes that are levied upon sales in the home market, but that are either rebated or not collected upon sales to the United States would be deducted from normal value. Under current law, an imputed tax is added to the price of export sales to offset the effect of such taxes. In addition, the House position would also deduct from the export price and/or normal value, as appropriate, all direct expenses, defined statutorily in the draft

bill as those that result from, and bear a direct relationship to, a sale of subject merchandise.

Senate:

Retains current law's methodology which distinguishes between the prices established in transactions between related parties (exporter's sales price (ESP)) and unrelated parties (purchase price), with two amendments: (1) revises the additional adjustments for ESP sales to provide, pursuant to Article 2.4, for an allowance for profits accruing, where merchandise has increased in value as a result of sales and distribution activities and any further manufacture or assembly in the U.S.; (2) includes a provision identical to the House with respect to adjustments for level of trade, quantities sold, and physical differences.

House Offer:

Defer.

Senate Counteroffer:

House recedes.